MARK J. GAIDA, Employee/Appellant, v. TRI CITY PAVING and STATE FUND MUT. INS. CO., Employer-Insurer, and ST. CLOUD HOSP. and BLUE CROSS/BLUE SHIELD/BLUE PLUS, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 24, 2000

No. [REDACTED SSN]

HEADNOTES

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Where the employee had not determined whether he would agree to undergo a fourth low back surgery, substantial evidence supports the compensation judge's finding that the employee is at MMI unless and until a final determination is made.

TEMPORARY TOTAL DISABILITY. Since the finding that the employee had reached maximum medical improvement was affirmed, discontinuance of temporary total disability benefits was appropriate.

Affirmed.

Determined by: Rykken, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Rolf G. Hagen

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's determination that the employee reached maximum medical improvement as of December 18, 1998, and from the compensation judge's denial of claimed temporary total disability benefits beyond the 90-day period post-service of maximum medical improvement. We affirm.

BACKGROUND

On June 13, 1994, Mark J. Gaida, the employee, sustained an admitted work-related injury to his low back while employed by Tri City Paving, employer, which was insured for workers' compensation liability by State Fund Mutual Insurance Company, insurer. On June 13, 1994, the employee earned an average weekly wage of $508.16. The employee was born on May 31, 1954, and was 40 years old on his date of injury. He injured his low back while replacing a power steering pump on a truck. He pulled a wrench hard to loosen a bolt, and felt a sharp pain in his low back, with pain radiating down his right leg. (T. 21.) The employee initially obtained medical treatment with his family physician, Dr. Clifford Stiles, who referred him to Dr. A. R. Watts. Dr. Watts diagnosed a herniated disc at the L4-5 level, and performed a discectomy surgery at that level on November 30, 1994. Due to continued low back and right leg symptoms, Dr. Watts

recommended and performed a second discectomy surgery on January 3, 1996, but the employee felt very little symptomatic relief after these two surgeries. (T. 23.)

On October 22, 1996, Dr. John Dowdle examined the employee at the request of the employer and insurer. Dr. Dowdle diagnosed mechanical low back pain, post-laminectomy; degenerative disc disease at the L4-5 level; and radiculitis at the L5 level on the right side. Dr. Dowdle opined that further evaluation would be appropriate including a discogram at the L4-5 level, and a review of the employee's MRI scan, to determine whether the employee was a candidate for surgical fusion at the L4-5 level. Dr. Dowdle recommended an anterior interbody fusion using a BAK device, if surgery were to be performed, in order to relieve some of the employee's leg pain. (Resp. Ex. 1.) On January 9, 1997, Dr. Watts performed a third surgery, a two-level fusion with Ray cages. The employee noted little improvement in his symptoms following this third surgery. The employee has not returned to work since his 1994 injury.

In October 1997, the employee experienced his first of three vasovagal[1] episodes when he awoke feeling lightheaded and later fainted. (T. 29.) The employee was hospitalized at the St. Cloud Hospital four or five days. He experienced two additional episodes in September 1998 and October 1998. On September 2, 1999, his treating physician at the University of Minnesota Central Minnesota Heart Center, Dr. David Benditt, opined that these vasovagal or syncopal episodes may be related to the employee's heart; Dr. Benditt advised that he had implanted an electrocardiographic monitor in the employee's chest to record future vasovagal episodes.

Following the employee's initial surgery in 1996, he experienced episodes of urinary urgency and frequency. These symptoms increased following his second and third surgeries. He experienced no overt incontinence, other than at the time of his three vasovagal or syncope episodes in 1997 and 1998. The employee originally claimed that these bladder symptoms were causally related to his low back injury on June 13, 1994.

On November 18, 1998, Dr. Charles P. Ehlen, urologist, examined the employee on behalf of the employer and insurer. Dr. Ehlen determined that the employee does not have "micturition syncope," that the medical records did not link his multiple disc surgeries and disc disease to his bladder symptoms, and that there is no causal relationship between the employee's work-related lumbar disc disease and his bladder symptomatology. Dr. Ehlen also opined that the employee's syncopal episodes are related to a disturbance of the central nervous system. (Resp. Ex. 4.) In an unappealed finding, the compensation judge determined that the employee's June 13, 1994 injury was not a substantial contributing factor to the need for medical treatment provided

[1] *Vasovagal attack* is defined as a transient vascular and neurogenic reaction marked by pallor, nausea, sweating, bradycardia, and rapid fall in arterial blood pressure which, when below a critical level, results in loss of consciousness and characteristic electroencephalographic changes. It is most often evoked by emotional stress associated with fear or pain. Called also *vasovagal* or *vasodepressor syncope*, and *Gowers' syndrome*. Dorlands' Illustrated Medical Dictionary 159 (28th ed. 1994).

for either the three vasovagal episodes or for an alleged bladder condition treated on January 11, 1998. (Finding No. 8)

At the request of the employer and insurer, Dr. Bruce Idelkope examined the employee on November 23, 1998. He diagnosed failed low back syndrome, a history of urinary urgency and paroxysmal episodes of an unknown etiology. Dr. Idelkope found that the employee had sustained a permanent injury as a result of his June 13, 1994 work injury, leaving him with residual radicular complaints. Dr. Idelkope determined that the employee had reached maximum medical improvement, and further commented that "were he not to have additional medical issues, [he] would be capable of finding some form of gainful employment within restrictions." (Resp. Ex. 3.) Dr. Idelkope opined that those neurological conditions of urinary difficulties and syncopal episodes were not related to the employee's low back injury. On December 18, 1998, the employer and insurer formally served the employee with notice of maximum medical improvement (MMI), with Dr. Idelkope's November 23, 1998 report.

The employee continued to consult Dr. Watts for his low back condition. On January 4, 1999, Dr. Watts examined the employee and determined that the employee had "probably reached maximum medical improvement and will not improve beyond his current status." (Pet. Ex. C.) At his next examination on February 23, 1999, the employee complained of increased low back pain and aching in his right leg, following which Dr. Watts recommended a CT scan and discogram to evaluate the employee's L3-4 disc. Dr. Watts indicated that he "had hoped to get an MRI scan, but he has an implanted electronic device which precludes this, and I will instead obtain a CT scan." (Pet. Ex. C.) According to Dr. Watts' report of March 11, 1999, the CT scan suggested the fusion was well-healed, and that the "L3-4 disc does not appear particularly bad." (Pet. Ex. C.)

Dr. Watts originally stated on January 5, 1999, that the employee had reached maximum medical improvement. As of March 11, 1999, however, Dr. Watts stated that

> At this time I feel he has reached maximum medical improvement with respect to his L4-5 and L5-S1 fusions, however, I suspect he is suffering from significant discogenic pain as a result of the increasing stresses imposed upon the L3-4 disc as a result of the fusions below this level. At the current time, his pain limits him entirely from any form of productive work activity.

(Pet. Ex. C.) On March 24, 1999, Dr. Watts reiterated that the employee had reached maximum medical improvement with respect to his L4-5 and L5-S1 fusions, and assigned a permanency rating of 17 percent permanent partial disability of the body as a whole. The employer and insurer commenced payment of periodic impairment compensation as of March 25, 1999, based upon that permanency rating.

As of March 24, Dr. Watts also stated that it is likely that in the future the employee will need to undergo a discectomy and fusion at the L3-4 level, commenting that this is a frequent

occurrence for those who have undergone either lumbar or cervical fusions. Dr. Watts assessed the employee as being essentially permanently disabled from any form of work which requires physical activity and that the employee would be able to return to employment only if retrained for sedentary type of employment. (Pet. Ex. C.) By May 10, 1999, Dr. Watts advised that based upon the employee's April 13, 1999 discogram results, he recommended an L3-4 anterior lumbar interbody fusion.

The employer initially admitted liability for an injury of the employee's spine at the L4-5 and L5-S1 levels. In an unappealed finding, the compensation judge determined that the employee sustained a consequential injury to his low back in the nature of symptomatic degenerative disc disease and annular tear at the L3-4 level, and that the employee's June 13, 1994 injury represents a substantial contributing cause of the employee's need for medical treatment at levels L3-4, L4-5, and L5-S1. (Finding No. 6)

On June 4, 1999, Dr. Dowdle conducted an additional examination of the employee, at the request of the employer and insurer. Dr. Dowdle diagnosed degenerative disc disease at the L3-4 level, and initially determined that the employee was a candidate for fusion at the L3-4 level, based upon those degenerative disc diseases and a positive discogram. However, Dr. Dowdle explained that it "would be a judgment call as to whether that is done or not. He has some inconsistencies on his exam." (Resp. Ex. 1) Dr. Dowdle suggested that in his opinion he would defer doing further surgery in that a three-level fusion would be more limiting as far as motion and function and that the employee had some inconsistencies on examination that cause concern about his ability to recover and to be functional and pain free. Alternatively, Dr. Dowdle considered the employee a candidate for rehabilitation and recommended that he return to work in a light-duty, sedentary type of job, with surgery in the future if his pain, difficulties and significant incapacity continued. (Resp. Ex. 1, Dowdle depo. p. 12)

In Dr. Dowdle's opinion, the employee's degenerative disc changes at the L3-4 level were not related to his work injury on June 13, 1994. Dr. Dowdle stated that, "Being that I am not recommending surgical management at this time, it is my opinion that Mr. Gaida is at maximum medical improvement relative to the June 13, 1994 injury." (Resp. Ex. 1) Dr. Dowdle assigned a permanency rating of 20% permanent partial disability of the body as a whole and assigned physical work restrictions for the employee, determining that the employee was capable of sustained employment at a sedentary level and was capable of working on a full-time basis.

Procedural History

On February 26, 1999, the employer and insurer filed a notice of intention to discontinue benefits pursuant to attainment of maximum medical improvement (MMI) as of December 18, 1998. On April 5, 1999, following an administrative conference, a compensation judge granted the employer and insurer's request for discontinuance of temporary total disability benefits, effective 90 days following service of MMI, by March 18, 1999.

On April 9, 1999, the employee filed an objection to the discontinuance of temporary total disability benefits. The employee also had filed a medical request on August 11, 1998, requesting payment for certain medical expenses. Both the medical request and the objection to discontinuance were consolidated for hearing, which was held on September 14, 1999.

In Findings and Order served and filed October 6, 1999, the compensation judge concluded, in part, that the employee had reached maximum medical improvement from the effects of his June 13, 1994 injury as of November 23, 1998, and that the employee had been served with notice of maximum medical improvement on December 18, 1998. The compensation judge allowed discontinuance of temporary total disability benefits 90 days thereafter, as of March 18, 1999. 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.

DECISION

Maximum Medical Improvement

The employee appeals the compensation judge's finding that the employee had reached maximum medical improvement (MMI) as of December 18, 1998. Maximum medical improvement is defined as "the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability." Minn. Stat. §176.011, subd. 25. Maximum medical improvement "occurs upon medical proof that the employee's condition has stabilized and will likely show little further improvement." Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740, 742 (W.C.C.A. 1987). Whether MMI has been reached is a question of ultimate fact for the compensation judge to decide. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989). The burden of proving MMI is normally on the employer and insurer. Burns v. Firestone Tire & Rubber, slip op. (W.C.C.A. June 29, 1993).

The compensation judge relied upon the opinion of Drs. Idelkope and Dowdle that the employee has reached maximum medical improvement from the effects of his June 13, 1994 injury. In so doing, the compensation judge rejected the opinion of Dr. Watts, the employee's treating surgeon. We note that it is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 NW.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The employee argues that he has not reached MMI for all conditions related to his June 13, 1994 injury. He does not dispute that he has reached MMI at the two levels of the lumbar spine which were originally injured, L4-5 and L5-S1. However, the employee argues that since surgery has been proposed for the third involved level, L3-4, and since a necessary diagnostic MRI scan cannot be completed until the employee's electrocardiographic monitor is removed, the employee cannot be considered as having reached maximum medical improvement from all compensable conditions presently contributing to his disability. See Schewe v. Tom Thumb, 46 W.C.D. 693 , 485 N.W.2d 570 (1992).

At the hearing on September 14, 1999, the employee testified that his back feels "knotted up" and that he has a "chronic throbbing pain" down his back. He testified that it "flares up and it's very, very uncomfortable." (T. 37-38.) The employee testified that the follow-up fusion surgery originally recommended by Dr. Watts has not yet been scheduled. The employee's understanding was that the final diagnostic study, an MRI, was needed before a final decision was reached on this fourth surgery. The employee testified that:

> What they're going on as of the L3-4 is my verbal pain, a discogram and a CAT scan, and there has been some talk of having an MRI done to get a better picture of what's going on. Consequently, I cannot have an MRI because of this implantable - - or this inserted loop recorder I have, and until that's taken out I won't have that diagnosis of an MRI. (T. 36.)

Although the need for or compensability of the employee's proposed surgery was not at issue at the hearing, Dr. Watts testified as to his recommendation for the surgery, and his prognosis for the employee's recovery from surgery. Dr. Watts recommended an anterior approach to the L3-4 level and an interbody fusion with bone dowels, and testified that the fusion "stands a reasonably good chance of removing the source of pain at the L3-4 level; however it will then alter the mechanics at the L2-3 level and cause degenerative changes to occur there. We'll probably in somewhere between two and five years precipitate the need for another fusion at that level." (Pet. Ex. F; Watts' depo. p. 12.)

Dr. Watts testified that from the standpoint of the employee's fusion and related only to the two levels of that fusion, the employee is at maximum medical improvement. Dr. Watts further testified that "from the standpoint of the fact that we've altered the lumbar mechanics and

are going to - - by the fusion and are going to precipitate accelerated degeneration of the adjacent discs, no, he's not [at maximum medical improvement]." (Pet. Ex. F, Watts' depo. p. 12.)

We agree that the issue of attainment of maximum medical improvement is a complex one, in these circumstances. The employee had not yet determined whether to proceed with the recommended fusion surgery, and he believed that he could not make that decision until an MRI scan could be completed. The employee testified that he was waiting for the electrocardiographic monitor to be removed so that he could undergo an MRI. As of the hearing date on September 14, 1999, the employee's electrocardiograph recorder was still implanted in his chest, as a precautionary measure to enable doctors to read any results from any further vasovagal episodes. Dr. Benditt anticipated that he would retain the recorder in the employee for at least one year, which would have expired in September or October 1999. According to the employee's testimony, Dr. Benditt suggested that "the longer he can keep it in, the better he wants it - - or wants it in." (T. 34.) The employee also testified that Dr. Benditt had not provided him a date as to when the recorder would be removed; the employee last consulted Dr. Benditt in approximately August 1999.

In his memorandum, the compensation judge stated that:

> Unfortunately, as of date of hearing, employee has not determined whether or not to undergo the proposed multi-level fusion and realistically is hampered in making this decision because his treating physician wants him to undergo an MRI scan prior to the final surgical decision is made. Employee is not in a position to make this determination now because he still has the loop recorder implant which precludes his taking an MRI scan. Also, employee has not yet decided whether to undergo a fourth surgical procedure.

(Memorandum, p. 10.)

The employer and insurer, in their brief, conceded that proposed surgery may be a factor in a compensation judge's determination of maximum medical improvement. See, Wilson v. Decker Lumber Co., 46 W.C.D. 319 (W.C.C.A. 1991). However, this court has earlier determined that an employee has to show some willingness to consider surgery, Wrobleski v. Lor Al, Inc., 51 W.C.D. 476 (W.C.C.A. 1994), in order for that surgical issue to be considered as a factor in determining MMI. At the time of the hearing, the employee had not determined whether he would agree to undergo a fourth low back surgery. Compensability of the surgery itself was not at issue at the hearing. The compensation judge determined that "unless and until a final determination is made regarding surgery" (Memorandum, p. 10), the employee is at maximum medical improvement.

By inference, the employee also argues that he has not yet reached MMI since Dr. Watts has neither released him to conduct a job search nor to return to work. On March 24, 1999, Dr. Watts wrote that he believed the employee was permanently disabled from physical

activity, and that the doctor believed the only way the employee would return to productive employment is to be retrained in a sedentary type of employment. Dr. Watts initially testified at his deposition that he would not release the employee to go back to anything but sedentary work, and that "he'll need retraining before I'd be prepared to release him." Dr. Watts later testified that "I'm not going to release him to be out there doing heavy work[,]" but later testified that "I'm allowing Mr. Gaida to go out and see if he can find work that he can do, yes." (Pet. Ex. F, Watts depo. p. 28.)

The compensation judge disagreed with Dr. Watts' assessment of the employee's ability to attempt to return to work. In his memorandum, the compensation judge further stated that "while the proposed surgical fusion is not an issue before the court, it must be noted that Dr. Dowdle, M.D., (orthopedic IME) did not feel that said surgery was appropriate at this time" but instead believed that the employee should attempt to return to work or at least search for work at this point. (Memorandum, p. 10.)

The compensation judge reasonably relied upon Dr. Dowdle's opinion that the employee should attempt to work, and adopted both Dr. Dowdle's opinion and Dr. Idelkope's opinion concerning maximum medical improvement. See Nord v. City of Cook, 360 N.W.2d at 342, 37 W.C.D. at 364. We agree that substantial evidence of record, including the medical opinions of Dr. Dowdle and Dr. Idelkope, supports the compensation judge's determination that the employee has reached maximum medical improvement, and we accordingly affirm.

Temporary Total Disability

The employee also appeals the compensation judge's discontinuance of temporary total disability benefits. Temporary total disability benefits ceased 90 days after service of maximum medical improvement. Minn. Stat. § 176.101, subd. 1j. Since we have affirmed the compensation judge's finding that the employee is at MMI, as of December 18, 1998, we affirm the discontinuance of temporary total disability benefits as of March 18, 1999.