RODNEY A. GIBSON, Employee, v. PARAGON CABLE/TIME WARNER, INC., and TRAVELERS. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 16, 2000

No. [REDACTED SSN]

HEADNOTES

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence, including medical and psychological records and lay testimony, supported the judge's determination that the employee had not yet reached maximum medical improvement from a psychological condition causally related to his physical injury. Whether that condition was a substantial contributing cause of his disability and inability to work was not resolved by the compensation judge and the matter was remanded for determination.

JOB OFFER - REFUSAL. Substantial evidence, including the employee's testimony and the medical records and restrictions, supported the compensation judge's finding that the employee did not unreasonably refuse suitable work offered by the employer in June 1997. As the compensation judge did not resolve the question of the reasonableness of a second job offer in March 1997, the matter was remanded to the compensation judge for resolution.

Affirmed in part and remanded in part.

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

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's award of wage loss benefits and from the findings that the employee had not reached maximum medical improvement and did not unreasonably refuse suitable employment offered by the employer.

BACKGROUND

The employee, Rodney A. Gibson, sustained an admitted work-related injury in a motor vehicle accident on January 22, 1997 while working for the employer, Paragon Cable, as a direct sales representative. At the time, the employee was 32 years of age. The employee's job involved walking door-to-door to attempt to sell cable television services. (T. 16; Finding 1.)

He was seen the following day, January 23, 1997, in urgent care by Dr. Cynthia A. Carlson at the Park Nicollet Medical Center, where he had been sent by the employer, and reported

that he was noticing neck pain, back pain, and pain in the left ankle. It was noted that he was tender in the small of his back and lumbar range of motion was limited. Dr. Carlson excused the employee from work for 2-5 days pending follow-up with an occupational medicine specialist. (Exh. 10.)

On January 28, 1997 the employee was seen by Dr. Constance N. Pries at the Park Nicollet Clinic in St. Louis Park, Minnesota. The progress note for that date principally discusses the employee's neck discomfort. Dr. Pries recommended that the employee work under restrictions which included no repetitive lifting over 15 pounds and no work activities above shoulder height. The employee was interested in chiropractic treatment, and Dr. Pries offered an appointment with a chiropractor, Dr. Bonsell. She suggested that the employee begin chiropractic treatment and return in two weeks. (Exh. 10.)

The employee instead began treating with his own chiropractor, Dr. Stephen Marty, that same day. Dr. Marty diagnosed a lumbar disc syndrome and lumbar sprain. The employee continued treating with Dr. Marty, who first released the employee to return to work on March 22, 1997, with the employee being restricted to sedentary work, without bending, squatting or climbing, not to exceed four hours per day. On March 27, 1997 Dr. Marty eased the employee's restrictions somewhat to permit light, rather than sedentary work, still at four hour per day, but noted that the employee should not sit for more than 30 minutes without getting up and walking about. (Exh. A: 1/28/97; Exh. 10: 1/28/97 progress notes, 3/22/97 & 3/27/97 work release forms.)

On March 26, 1997, the employer offered the employee a return to work as a data entry representative in its sales department four hours per day. The employer offered to pay the employee $10.00 per hour or $200.00 per week. (T. 67.) The employee attempted this job briefly, but testified that he was unable to tolerate the work as his back and neck hurt too much. (Exh. 2; T. 15, 26, 66-67.)

On June 12, 1997, the employee was examined by Dr. Nolan M. Segal on behalf of the employer and insurer. Dr. Segal was unable to assess the employee's range of motion due to guarding. He offered the opinion that the employee's complaints were not supported by objective, clinical findings and were merely subjective. He stated that the employee had reached maximum medical improvement and should be able to perform door-to-door sales work on a full-time basis. (Exh. 9.)

Based on Dr. Segal's report, the employer wrote a letter to the employee on June 26, 1997 offering the employee a return to work in his job as a direct sales representative, to start on July 8, 1997. The job offer, however, also required that the employee provide a statement from his physician indicating his fitness for the position. He was also to "provide proof of adequate insurance." (Exh. 3.)

The employee was seen by a neurologist, Dr. Richard V. Johnson, on July 9, 1997, on referral by Dr. Marty. Dr. Johnson recorded as history that the employee had developed neck pain and pain down the lower back following a car accident on January 22, 1997. The employee's

symptoms on the date of examination were pain down into the left buttock and leg and numbness. The employee was seen to exhibit 50 percent limitation in lumbar flexion. As a result of the radicular distribution of the employee's pain complaints, Dr. Johnson recommended an MRI scan. He thought the employee could work perhaps five hours per day with standing, sitting or walking limited to three to four hours in the workday and with a change in position every 30 minutes, so that if he were to do walking he should sit periodically. He also recommended that the employee do no heavy lifting. (Exh. A: 7/9/97.)

The employee was next seen by Dr. Johnson on July 15, 1997. In a letter to Dr. Marty on that date, Dr. Johnson enclosed the report of an MRI scan performed on the employee's low back, which showed a broad based posterior disc herniation on the left side at L4-5 compressing the left L5 nerve root. Dr. Johnson opined this was probably responsible for the pain down the employee's leg. The scan also showed broad based bulging at L5-S1. The employee indicated to Dr. Johnson that he was not interested in surgery. Dr. Johnson noted that the employee had reported to him that the employer did not want him to come back to work unless he worked full time. Dr. Johnson stated that any return to work should be limited to four hours per day. The employee did not accept the employer's June 27, 1997 job offer. (Exh. A: 7/15/97 letter.)

The employee was seen for a neurosurgical consultation on October 6, 1997 by Dr. Andrew J. K. Smith. The employee's symptoms included low back pain and pain radiating into both lower extremities, worse on the left than the right, and pain and occasional numbness in the left posterior aspect of the left thigh and calf. Dr. Smith diagnosed low back mechanical pain which correlated with degenerative disc disease seen at L4-5 and L5-S1 on the MRI. He noted that the employee had a broadbased bulging disc at L4-5 and small bulging or herniated disc on the left at L5-S1 but did not associate these with objective neurological findings, and did not think discectomy and decompression surgery would be helpful at that point. Dr. Smith thought it would assist the employee to lose some weight. (Exh. A.)

On January 7, 1998 the employer and insurer filed a notice of intent to discontinue temporary total disability compensation on the basis that the employee was then 90 days past maximum medical improvement based on the June 12, 1997 report of Dr. Segal. The employee requested an administrative conference on the discontinuance. (Judgment Roll.)

The employee was again seen by Dr. Johnson on January 19, 1998. He stated that on examination the employee appeared "about the same" as when previously seen in July 1997. Dr. Johnson diagnosed a broad-based left posterior herniation at L4-5 abutting and compressing the left L5 nerve root. He prescribed a health club membership and offered restrictions including limiting standing and sitting to three to four hours each, with position changes every one-half hour, and work limited to four hours per day in a five-day week. (Exh. A.)

An administrative conference was held on the proposed discontinuance on February 2, 1998 before settlement judge Paul D. Vallant of the Department of Labor and Industry. Following the conference, Judge Vallant served and filed an Order on February 10, 1998 allowing

the discontinuance. The employee filed an objection to discontinuance dated February 12, 1998. (Judgment Roll.)

The employee found part time work as a telemarketing sales associate with Mid America Auto Glass from February 16, 1998 through June 15, 1998, during which period he earned a total of $988.25. (Exh. 6.)

On April 6, 1998 Dr. Johnson prescribed a three month health club membership where the employee could work with an injury management specialist. (Exh. A.)

On June 1, 1998, the employee signed a stipulation for partial settlement with the employer and insurer. The stipulation recited that the employee claimed entitlement to various periods of temporary total and temporary partial disability compensation and that he was in need of certain treatment modalities prescribed by Dr. Johnson, including a health club membership, the assistance of an injury management specialist and the assistance of a soft tissue mobilization provider. The employer and insurer alleged that the employee was not entitled to further temporary disability compensation in that he had reached maximum medical improvement, had refused full time gainful employment offered by the employer and had failed to conduct a reasonably diligent job search. The employer and insurer further denied that the health club treatment recommended by Dr. Johnson was reasonable and necessary. The employee agreed to settle his claim for wage loss benefits through August 9, 1998 and for the costs of health club treatment for six months from the date the employee should begin such treatment, in return for a lump sum payment of $5,754.00, including $750.00 as attorneys fees to the employee's attorney. The employee expressly reserved his right to assert future claims and expressly denied any stipulation to the alleged occurrence of maximum medical improvement. An award on stipulation was served and filed on June 26, 1998. (Judgment Roll.)

On June 11, 1998, the employee returned to Dr. Johnson in follow up and reported a flare up of his pain six days previously, with more pain in the low back, pain down in the right heel and numbness in the left leg. Dr. Johnson noted that the employee had been involved in an exercise program doing therapy and losing weight but that funds were cut off by the insurance company and the employee had discontinued the health club program. The employee had a 50 percent limitation in lumbar flexion, which was a change since last seen by Dr. Johnson. Considerable tenderness was noted over the employee's low back, but the doctor found it difficult to tell if spasm was present because of the employee's size. There was some "give way" weakness of the right leg, particularly with flexion at the hip, and some pain on straight leg raising at about 70 degrees bilaterally. Dr. Johnson's impression was of an acute flare up of lumbar strain and lumbar radiculopathy. He prescribed Relafen and Tylenol 4 and took the employee off work for about one month, after which he thought the employee might again return to limited duty. (Exh. A.).

The employee continued treatment with Dr. Johnson until that doctor retired from practice. The employee's care was transferred to Dr. Shelly Svoboda who first saw the employee on September 15, 1998. As of that date, the employee's primary symptoms continued to be

diffuse upper and lower back pain complicated by chronic tension headaches, all exacerbated by extended sitting or by bending and twisting. There was decreased flexion of the trunk. Dr. Svoboda kept the employee in an off work status. She also was concerned about the employee's depressed state and referred him for counseling. (Exh. A.)

The employee was seen on referral by Thomas E. Harbaugh, Ph.D., L.P., on September 16, 1998 at the North Regions Mental Health Clinic. He was diagnosed with an adjustment disorder with depressed mood and a pain disorder associated with both his psychological and general medical condition. As a treatment plan, the employee was offered individual psychotherapy once per week to once per two or three weeks, with an indefinite total of sessions not projected to be likely to exceed eight to ten sessions. (Exh. B.) The employee testified that he may have seen Dr. Harbaugh on one additional occasion for counseling.

On December 31, 1998, the employee filed a claim petition seeking temporary total disability compensation from and after August 10, 1998. (Judgment Roll.)

On January 7, 1999 the employee was again seen by Dr. Svoboda in follow up. She noted that the employee's condition was relatively unchanged. Straight leg raising was equivocally positive at 50-60 degrees bilaterally. Dr. Svoboda diagnosed ongoing lower back pain with L5 radiculopathy. Dr. Svoboda recommended epidural steroid injections, and kept the employee in an indefinite off work status. On January 19, 1999 the employee underwent an epidural steroid injection at L4-5. (Exh. A.)

On April 28, 1999 Dr. Svoboda noted that the employee's leg and back pain was dramatically diminished following the epidural injection and that he was doing well on his current medications. She suggested that injections might be repeated sometime in the next several months if necessary, but that otherwise the employee should return in follow up in three months. (Exh. A.)

The employee underwent a repeat examination by Dr. Nolan M. Segal on May 11, 1999 on behalf of the employer and insurer. Dr. Segal acknowledged that the employee had permanent partial disability of the low back and that he was in need of work restrictions, including limited lifting, avoidance of repetitive bending, lifting and twisting, and the ability to change position as needed, but that the employee could work full time within these restrictions. However, the doctor opined that the employee's back condition had preexisted the 1997 motor vehicle accident and that the accident had caused, at most, minor strains to the employee's low back and neck, resulting in temporary aggravation of the preexisting condition and requiring treatment only by a home exercise program. (Exh. 1.)

On November 10, 1999 the employee filed a medical request seeking payment of the costs of evaluation and treatment at North Regions Mental Health Clinic. On October 22, 1999 the employer and insurer filed a medical response denying the reasonableness, necessity and causal relationship of the mental health treatment and requesting that the issue be consolidated with the hearing on the employee's claim petition. (Judgment Roll.)

The employee was seen on November 12, 1999 by Dr. Svoboda, who recorded that the employee's radicular pain was more severe and persistent, with radiating pain down the legs. The employee also related his difficulty with and concerns about his depression. Dr. Svoboda noted that the employee appeared more depressed than he had been for some time. The doctor diagnosed a flare-up of the employee's radicular pain. She scheduled the employee for another epidural injection, and prescribed Prozac to help alleviate his depression. (Exh. A.)

A hearing was held before a compensation judge of the Office of Administrative Hearings on December 15, 1999. The record remained open thereafter for submission of the most recent medical records. (T. 11.) On December 20, 1999 Dr. Svoboda put the employee on permanent work restrictions limiting him to very light work, no longer limited to part time, with no bending. (Exh. D.)

In his findings and order, served and filed on March 14, 2000, the compensation judge found that the employee had not reached maximum medical improvement from all conditions and that the employee had not refused suitable employment offered by the employer and insurer. The judge therefore awarded wage loss benefits from August 10, 1998 to December 20, 1999. The judge further found that treatment for the employee's depression at the North Regions Mental Health Center was reasonably necessary treatment and that it was causally related to the employee's physical injury. Finally, the judge granted a rehabilitation consultation. 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

Maximum Medical Improvement

Maximum medical improvement is defined by statute 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, irrespective and regardless of subjective complaints of pain." Minn. Stat. § 176.011, subd. 25. MMI must be reached on all compensable conditions presently contributing to the employee's disability before MMI is effectual. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 529, 41 W.C.D. 634, 341 (Minn. 1989). The compensation judge may conclude that MMI has been reached where there is medical proof that the employee's condition is stabilized and will likely show little further improvement based on reasonable medical probability. Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740 (W.C.C.A. 1987). MMI is an issue of ultimate fact to be determined by the compensation judge after considering medical records, medical opinions, and other data and circumstances. "Medical probability does not mean only the opinion of a physician." Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 529, 41 W.C.D. 634, 639 (Minn. 1989).

The compensation judge found that the employee had not reached MMI because he continued to need psychological counseling. (Finding 3.) Underlying this finding are both the express finding (Finding 5) that the employee's depressive condition is consequential to his compensable low back injury and the implicit finding that psychological counseling will likely result in improvement to this psychological condition. (Memorandum to Findings & Order, pp. 6-7.)

On appeal, the employer and insurer raise various objections to the compensation judge's determination of the MMI issue. First, they assert that the judge may have been "confused" about the law applicable to the issue of MMI, complaining that the judge engaged in "a mere recitation of boilerplate restatement of law on unrelated points." (Appellants' Brief at 21.) The employer and insurer further point to nine "important points" they wish this court to consider on review of the judge's MMI finding. Much of this list, including the appellants' characterization of the employee as a "chronic, habitual insurance claimant," discussion of his activities as a musician, and recitals of "gaps" in the employee's medical treatment or of alleged variations in the description of the motor vehicle accident, relate to the employer and insurer's attempts at hearing to call into question the employee's credibility regarding the extent of his physical symptoms. Credibility assessments are a unique function of the trier of fact, and this court will not disturb a trial judge's assessment of witness credibility unless clearly erroneous. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). Nothing in the material alluded to by the employer and insurer is of a nature which would require us to reverse the judge's findings, even if the findings may have rested in part on the judge's acceptance of the employee's testimony.

Other material in the appellants' list of "important points" addresses whether the employee adequately demonstrated that MMI had not been reached from his *physical* condition. As the compensation judge's MMI determination rested not on the *physical* but rather on the *psychological* residuals of the employee's injury, such arguments are not relevant to the issue as determined by the compensation judge.

Instead, we must determine whether the compensation judge's findings relevant to the maximum medical improvement from the employee's psychological condition are supported by substantial evidence, or whether they are clearly erroneous. The finding of a causal connection between the physical work injury and the employee's psychological condition is supported by the psychological records of the North Regions Mental Health Center and by the medical records of Dr. Svoboda. The need for further treatment is supported by treatment recommendations made by Dr. Harbaugh at the North Regions Mental Health Center for further psychological counseling as well as by the recent records of Dr. Svoboda which showed that the employee continued to suffer from depression. The employee saw Dr. Harbaugh for only a few sessions until the treatment was discontinued because of the denial of payment for the treatment by the insurer. The employee testified that he would like to resume this treatment and that it had begun to help him with his depression. (T. 40.) We conclude that the evidence is sufficient to support the compensation judge's findings on this issue.

Finally, the employer and insurer argue that the employee's psychological condition was not *independently disabling*, and suggest that this case is therefore in some fashion controlled by Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987). In Kautz, our supreme court held that "where the employee is found medically able to return to work without restrictions, having suffered no residual disability from his work injury," there is no basis for payment of temporary wage loss benefits or rehabilitation services after that date. 410 N.W.2d at 845, 40 W.C.D. 206 at 208. We are somewhat sympathetic to this argument, but cannot conclude that the compensation judge's decision should be reversed.

In order for the attainment of MMI as to the employee's depressive condition to be relevant to the perpetuation of his claim for temporary total disability, there must be a finding that the condition was at least a substantial contributing cause of his total disability during the period claimed. The compensation judge made come confusing and perhaps inconsistent statements about the impact of the employee's depression. It is unclear if the judge made a finding concerning the disabling effect of the employee's depression before December 20, 1999. It is possible that the compensation judge's comments were limited to the effects of the employee's depression at or after the date of the hearing. As a result, we remand this issue to the compensation judge for a determination of whether the employee's depressive condition was a substantial contributing factor to his total inability to work from August 10, 1998 to December 20, 1999. If it was not, then the employee's claim for temporary total disability benefits would depend on whether and when he reached MMI from his physical condition. In that case, the compensation judge should then address that issue on remand. The compensation judge may take additional evidence on this issue at his sole discretion.

Employer's Job Offers

The employer and insurer contended below that the employee had unreasonably refused the employer's job offers of March 26 and June 26, 1997, and renew their arguments on appeal. As a result, they claim he "has no further claim to ongoing temporary disability benefits

or rehabilitation expense benefits." (Appellants' brief at p. 30.) The compensation judge found that the employee had not unreasonably refused work offered by the employer.

As of March 22, 1997, the employee was restricted to four hours sedentary work per day by his treating chiropractor, Dr. Marty. The employer's offer on March 26, 1997 was, accordingly, for part-time work doing data entry four hours per day. (Exh. 2.) The employee attempted this job briefly, but testified that he was unable to tolerate the pain he experienced while performing this job. (T. 15, 26.) On March 27, 1997 Dr. Marty clarified the employee's restrictions noting that the employee should not sit for more than 30 minutes without getting up and walking about. (Exh. 10: 3/22/97 & 3/27/97 work release forms.) The employer and insurer presented evidence, in the testimony of the employer's representative, Mr. Tazel, that the reason the employee did not continue in the job was solely because of an inability to obtain child care. (T. 100.) The employee, however, testified that child care was available. (T. 68, 110.) The compensation judge accepted the employee's testimony that lack of child care was not the reason for his failure to continue in work offered by the employer. (Finding 3.)[1]

The employer's job offer on June 26, 1997 was for a return to full-time work in the employee's pre-injury job walking door-to-door selling cable television subscriptions, consistent with the opinion of their medical examiner, Dr. Segal. The employer conditioned the job offer on the employee's ability to provide "fitness for duty from a physician, stating that you are able to return to your regular position." The employee was at that time scheduled for a referral appointment with Dr. Johnson, who subsequently became the employee's treating physician. Dr. Johnson saw the employee on July 9, 1997. Based upon his examination of the employee, Dr. Johnson did not authorize the employee to work full-time in the pre-injury job, instead restricting him to four hours per day with standing, sitting or walking limited to three to four hours in the workday and with a change in position every 30 minutes. (Exh. A: 7/9/97.) The employer and insurer concede in their brief that "the four hour per day restriction . . . could not be accommodated at that point" in the offered job. (Appellants' Brief at 28; see also T. 71-72.) The employer and insurer also argue that the real reason the employee did not accept this job offer was that it was to be paid as a commission based salary. (T. 103-04.) The employee testified that he only wanted a fixed salary for a brief period on returning to work. (T. 109-10.) The compensation judge expressly adopted the opinions of the employee's treating physicians over those of Dr. Segal. We must affirm the judge's choice between conflicting expert opinion as the opinion relied upon had adequate foundation. Nord, *supra*, 360 N.W.2d 337, 37 W.C.D. 364.

The employer and insurer object to the compensation judge's failure to address each of the two 1997 job offers as a separate and distinct issue. While the compensation judge's findings seem to focus on the efficacy of the second job offer, we believe there may be an explanation of why the judge so limited his decision. In summation, the attorney for the employer and insurer

[1] While the compensation judge accepted the employee's testimony about the availability of day care, it appears that he did so in the context of his finding concerning the employee's failure to accept the June 26, 1997 job offer. The employer did not contend that day care needs were in any way related to the failure to accept the June 26, 1997 offer. On remand, the compensation judge should clarify his findings on this matter.

stated that "we do have an employer here who did make a best effort to be accommodating. Suitable work was offered in two instances, initially on a part-time basis. The reason given for refusing that offer of work was unrelated to the work injury." He further stated that, "we would maintain that the employee was unreasonable in refusing that second offer of employment in June of 1997 . . . ." (T. 131.) Perhaps the compensation judge believed that the employer and insurer were only contending that the second refusal was unreasonable. A careful reading of the employer and insurer's comments, however, leads us to conclude that they were basing their position on both job offers. As to the issue of the June 27, 1997 job offer, which the compensation judge clearly addressed, we believe there is substantial evidence in the record to support his finding that the refusal was reasonable. Specifically, Dr. Johnson indicated that the employee could not perform a full-time position. The employer was not willing to make the offer part-time. We affirm the compensation judge's finding concerning the June1997 job offer. The compensation judge, however, did not directly address the March 1997 job offer. On remand, the compensation judge should specifically deal with whether the employee was unreasonable in refusing that offer.

The findings and order of the compensation judge are affirmed in part and remanded in part in accordance with this opinion.[2]

[2] Appeal was also taken from the award of a rehabilitation consultation. The minimal discussion of this issue in the appellants' brief, consisting of part of one line in the prayer for relief, discloses that the appeal on this issue was predicated on the same arguments as those given in the appeal from the finding that the employee had not unreasonably refused the job offers made by the employer. Accordingly, we have not discussed the issue of the rehabilitation consultation separately in our opinion.