

DAVID A. HARNEY, Employee/Appellant, v. FAGEN, INC., and CNA RISK MGMT. GRP., Employer-Insurer/Cross-Appellants, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 18, 2000

No. [REDACTED SSN]

HEADNOTES

TEMPORARY BENEFITS - FULLY RECOVERED. Substantial evidence supported the compensation judge's decision that the employee was subject to restrictions affecting his employability through June 5, 1999, but not thereafter.

Affirmed.

Determined by Pederson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Paul V. Rieke

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's conclusion that the employee was capable of full-time work, without restrictions, after July 7, 1999, and from the judge's resulting denial of temporary partial and rehabilitation benefits after that date. The employer and insurer cross appeal from the judge's conclusion that the employee was emotionally and/or psychologically disabled from November 25, 1998, through June 5, 1999, and from his resulting award of wage loss benefits during that period. We affirm.

BACKGROUND

The employee began working as a millwright for Fagen, Inc. [the employer], in May of 1996. About a year and a half later, on October 10, 1997, he sustained a work-related injury when a high-pressure hose malfunctioned, spraying him near the corner of his mouth on the right with a highly pressurized stream of water. The force of the spray lacerated the employee's face near the corner of his mouth and created a channel or trench from that point, up through his cheek, to an exit point near the outside corner of his right eye.¹ The employee was working as a supervisor of a maintenance crew and was earning \$978.14 a week on the date of this injury.

Immediately following the injury, the employee was taken by ambulance to a hospital in Marshall, Minnesota, which shortly thereafter transferred him to a hospital in Willmar for more specialized evaluation. He was discharged from the hospital after only a few days but

¹ Some medical records indicate that the water stream entered near his eye and exited near his mouth.

received extensive additional treatment for continuing symptoms, which included severe jaw pain, vision problems, facial edema, facial muscle spasm, facial numbness, intermittent hearing problems, sinus congestion, headaches, dryness of the eyes, and facial sensitivity to wind, bright light, and extreme temperatures. The employee was eventually treated or evaluated for these complaints by numerous physicians, including Drs. Mark Satz, John Schulte, Christine See, Kenneth Carter, Mary Bhavsar, William Rossing, Praful Kelkar, Timothy Pieh, Alan Weingarden, and Joel Gedan. Some of the specialties represented by these physicians included dentistry, audiology, neurology, ophthalmology, and otolaryngology. Treatment modalities included numerous medications,² physical therapy for jaw mobility, facial exercises, oxygen therapy, stellate ganglion blocks, and a TENS unit; diagnostic tests included MRIs, CT scans, and a bone scan.

The employee's vision problems, facial edema, and jaw pain subsided over time. However, the employee testified that he continues to experience intermittent severe pain and pressure behind his right eye, as well as headaches, which are exacerbated by physical exertion and exposure to bright light, extreme cold and heat, and wind. Physicians essentially agree that the October 10, 1997, accident caused permanent injury to the fifth and seventh cranial nerves on the right side of the employee's face. Opinions vary, however, as to whether the employee should observe restrictions on his work activities. Dr. Carter, who became the employee's primary treating physician, has from the outset recommended various work restrictions, including restrictions on hours and outdoor employment, and he continues to believe that the employee should avoid the conditions that seem to aggravate his symptoms. In contrast, Dr. Joel Gedan, who first evaluated the employee on the employer and insurer's behalf in September of 1998, indicated that he would place "no restrictions at all" on the employee's work activities as a result of his "minimal" nerve dysfunction.

The employer and insurer voluntarily paid various workers' compensation benefits following the employee's 1997 injury and on into the fall of 1998, but, pursuant to an order issued December 2, 1998, they were allowed to discontinue wage loss benefits effective November 25, 1998, on grounds that the employee was physically capable of working without restrictions. In response, the employee filed an objection to discontinuance. Also in December of 1998, the employer and insurer filed a rehabilitation request, seeking discontinuance of rehabilitation services, and rehabilitation assistance was placed on hold. Both matters were eventually set for hearing before a compensation judge. In the meantime, in late February of 1999, the employee obtained a part-time job as a cashier at Casey's Convenience Store, working about twenty hours a week through June 5, 1999. About a month later, on July 7, 1999, he started work as a field engineer, full time, for Wozniak Construction. The field engineer job paid \$14.00 an hour but was thought to be temporary.³

² Medications prescribed at one point or another included a Clonidine patch, Neurontin, Tegretol, Nortriptyline, Ultram, Darvocet, Calan, Ismelyn, and Tylenol.

³ The employee started the job only a week prior to hearing. It was set to end in September, but the employee nevertheless hoped to continue working for Wozniak.

The matter came on for hearing before a compensation judge on July 15, 1999, for resolution of the employee's claims for wage loss benefits after November 25, 1998, and for rehabilitation benefits. Evidence included the employee's rather extensive medical records, the deposition testimony of Dr. Carter and vocational expert Jan Lowe, the reports of independent examiners Drs. Gedan and Weingarden, the testimony of the employee, the employee's QRC, and the employee's wife, and videotapes and reports from surveillance of the employee conducted in April, July, and August of 1998.⁴

In a decision issued on August 2, 1999, the compensation judge concluded that the employee was entitled to wage loss benefits through June 5, 1999, but that he was capable of full-time unrestricted work thereafter, and the judge accordingly denied the employee's claims for rehabilitation assistance and for temporary partial disability benefits based on his earnings from Wozniak Construction. Both parties 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

In Finding 12, the compensation judge explained at some length his conclusions as to the effect of the October 1997 work injury on the employee's employability during the period at issue. That finding reads, in pertinent part, as follows:

The employee's treating physician, Dr. Carter, has diagnosed the employee's condition as "atypical facial pain". In Dr. Carter's deposition he makes reference to the psychological component of the employee's difficulties and outlined his approach to the employee's care stating that the employee should "try jobs not real difficult to start with and try to see if he could find a level that he

⁴ The surveillance videotapes show the employee fishing and attending outdoor events.

could go back to work". Vocational expert Jan Lowe did not see evidence that the employee was limited psychologically so as to require work hardening but she did agree that work hardening does incorporate a psychological adjustment in returning an employee to full time work activity. The employee's wife testified concerning the change in personality and emotions of the employee since the date of his work injury and further discussed the alterations in their lifestyle as a result of the employee's emotional status.

The employee's emotional psychological make-up was affected by the traumatic injury of October 1997. The preponderance of the evidence does prove that by the fall of 1998 the employee was physically capable of returning to full time work activity. Nevertheless, the Court finds that following the discontinuance of compensation the employee still was psychologically/emotionally restricted in reentering the labor force at the full capacity which he performed prior to his injury. The employee was left without the rehabilitation support and assistance that may have enabled him to find an appropriate means of regaining an employment position with an employer in a graduated manner as was suggested by the employee's treating physician, Dr. Carter.

* * *

On July 7, 1999, the employee found full time work at \$14.00 per hour. The employee testified to his ongoing symptoms of headaches and swelling of his face but the Court finds that as of this date the employee's injury from a physical and emotional status no longer restricted the employee from employment activity which he performed at the time of injury. The employee has now appropriately gradually reentered the labor force after recovering from a most serious physical and emotional event and now has the capability of full time unrestricted employment activity. The employee is not taking any medications and has no scheduled appointments to see his treating physician. The employee's treating doctor does not recommend any additional referrals and the independent examiners do not believe the employee is in need of any additional treatment. The videotapes demonstrate that the employee is not significantly physically disabled and that he is able to be outdoors. The employee maintains that stress aggravates his symptoms and related that much of the stress is over personal matters such as family finances. With the employee's ability to now perform gainful employment activity, such personal stress and aggravation will likely be alleviated.

In his memorandum, the judge added that “any lingering symptoms alleged by the employee would not be a significant factor to his employment status.”

On appeal, the employer and insurer argue that substantial evidence does not support the judge’s conclusion that the employee was psychologically or emotionally restricted from full-time work through June 5, 1999, contending that “[t]here is not a scintilla of medical evidence . . . indicating that the employee suffers from any psychological disability or restriction.” However, complaints of depression are noted in Dr. Carter’s treatment records in August of 1998, November of 1998, and April of 1999, and Dr. Carter testified that he had prescribed Wellbutrin for the employee in part because the employee “looks depressed a lot of the time when I see him.” Dr. Carter also explained that he had recommended restrictions, all along, at least in part because of “the psychological part of getting [the employee] back to work . . . [to] get [the employee] to be able to tolerate going back to work.” Even Dr. Gedan, the employer and insurer’s examiner, indicated in his February 10, 1999, report that the employee seemed to have “mild depression . . . that may be complicating his recovery.” In view of these records, the traumatic nature of the employee’s injury, and the length of time the employee was off work, it was not unreasonable for the compensation judge to conclude that the employee was not fully capable of unrestricted work, due to the psychological/emotional effects of his work injury, before June 5, 1999.

In his appeal, the employee argues that the compensation judge erred in concluding that the employee was no longer disabled due to his work injury and in denying temporary partial disability benefits after July 7, 1999, as well as rehabilitation benefits.⁵ In support of this argument, the employee points out that there is no evidence that his restrictions changed in any way as of July 7, 1999. It is true that no physician changed the employee’s restrictions as of that date; however, as indicated previously, the compensation judge based his decision as to benefit entitlement through June 5, 1999, primarily on the psychological, not the physical, effects of the employee’s injury, and it was reasonable for the judge to conclude that the employee is now psychologically capable of unrestricted work, having in effect completed the kind of work hardening, through the part-time job at Casey’s, that had been recommended by Dr. Carter. Further, contrary to the employee’s argument, the compensation judge’s denial of benefits after June 5, 1999, does not rest on the conclusion that the employee’s pain complaints are merely psychological but on the conclusion that those complaints do not necessitate any restrictions on the employee’s employment activities. This conclusion is supported by the reports of Dr. Gedan.⁶ Finally, again contrary to the employee’s arguments, the judge did not base his denial of benefits on any finding that the employee’s job with Wozniak Construction was “suitable” but on his

⁵ The employee made no claim for temporary total disability benefits between the end of his job with Casey’s Convenience Store on June 5, 1999, and the start of his job with Wozniak Construction on July 7, 1999. At hearing, the employee’s attorney acknowledged that that period would fall beyond 90 days post maximum medical improvement. See Minn. Stat. § 176.101, subd. 3e (repealed 1995).

⁶ As the employee correctly notes, subjective complaints of pain may form the basis for restrictions or for the conclusion that offered work is not suitable. See Brenning v. Roto-Press, Inc., 237 N.W.2d 383, 28 W.C.D. 225 (Minn. 1975). It does not follow, however, that a compensation judge must base his decision on such subjective complaints.

conclusion that the employee is now capable of unrestricted work, despite any “lingering symptoms.”

This is a difficult case from an appellate perspective, because there is no one piece of evidence that supports the judge’s decision that the October 1997 work injury continued to affect the employee’s employability through June 5, 1999, but not thereafter. However, the underlying issues are entirely factual in nature, and it is evident to us that the judge thoroughly considered the record. Therefore, because we cannot say that the judge’s decision is clearly erroneous or unsupported by evidence that a reasonable mind might accept as adequate, we affirm his decision in its entirety.