SUSAN KNOWLES, Employee, v. EVERGREEN INDUS. and LIBERTY MUT. INS. CO., Employer-Insurer/Appellants, and MN DEP'T OF HUMAN SERVS., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 28, 2000

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - ADEQUACY OF FINDINGS. A finding of maximum medical improvement is not necessarily a requirement for a determination of permanent total disability, and the compensation judge did not err by awarding compensation for permanent total disability without making findings as to MMI or as to the potential benefits of a pain medication that he awarded.

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee was subject to pre-existing panic attacks and agoraphobia, where her psychiatric condition was aggravated by her work injury, and where the judge's decision was supported by the opinions of seven physicians and one QRC viewed together as a group, the compensation judge's conclusion that the employee was permanently totally disabled as a result of her physical work injury in combination with her pre-existing and work-injury-aggravated psychiatric problems was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the judge had also awarded payment for a pain medication that could result in somewhat more regular and less dangerous pain relief.

Affirmed.

Determined by Pederson, J., Wilson, J. and Rykken, J.
Compensation Judge: Donald C. Erickson

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's conclusion that the employee is permanently and totally disabled. We affirm.

BACKGROUND

Susan Knowles has endured a substantial history of traumatic experience. She has suffered from migraine headaches since she was three years old. At the age of nine she was witness to her father's death in the burning of her home in which he was bedridden. She was also a victim of physical and sexual abuse by boyfriends of her mother and later by her first two husbands. Ms. Knowles has been treated for trauma-related panic attacks and depression since about 1990. Ms. Knowles' educational and employment history has also been ranging and somewhat sporadic.

She dropped out of high school in the tenth grade but eventually completed a GED in 1986 at the age of twenty-six. She subsequently took some correspondence courses and several quarters of a legal secretarial course at a community college, but she opted not to complete the course in order to share in the management of a small grocery business. In addition to that grocery work, Ms. Knowles has worked at painting curbs, fast food marketing, waitressing, cooking, convenience store management, wild rice processing, delivering newspapers, sewing snowsuits, conducting a personal crafts business, clerking in a Ben Franklin store, and night clerking at a gas station.

In November of 1996, Ms. Knowles began working as a laborer at Evergreen Industries. On about November 15, 1996, two days after taking the job, Ms. Knowles [the employee] sustained a work-related injury to her low back when she fell backward in the process of attempting to free a wreath that had frozen to the floor of a semitrailer. At the time of her injury, the employee was thirty-six years old and was earning a weekly wage of $200.00. Evergreen Industries [the employer] and its workers' compensation insurer admitted liability for the injury and commenced payment of benefits. The employee was treated initially for mid lower back pain that radiated primarily into her right leg as far as the knee and occasionally into her left leg. Since that time, the employee has undergone substantial evaluation and treatment for both her physical problems and her psychological problems by at least nine different physicians whose opinions are material to this appeal.[1]

With her symptoms continuing, the employee was examined on June 13, 1997, by rehabilitation specialist Dr. Jed Downs, to whom she complained of continuing bilateral leg pain, right leg numbness, and urinary incontinence. On examination, Dr. Downs found in part "significant muscle imbalance and severe inhibition of gluteal and abdominal oblique musculature," and he ordered an MRI. The MRI was read to reveal a bulging disc at L5-S1 that did not apparently compromise the exiting nerve root. On July 9, 1997, Dr. Downs administered L5-S1 facet injections and a right sacroiliac injection, which relieved the employee's symptoms for only a short time, and physical therapy was recommenced.

On August 21, 1997, the employee was examined for the employer and insurer by orthopedic surgeon Dr. Robert Hartman, who concluded that the employee had sustained only "soft tissue injuries to the cervical and lumbar spines" consequent to her work injury. Noting "a significant giving way and breakaway rigidity on motor testing," Dr. Hartman opined on September 8, 1997, that the employee's present complaints were "related to her psychological stress and not to an objective structural injury." Finding "absolutely no physical examination or radiographic abnormalities which suggest the need to impose restrictions" and no need for any further medical care other than instruction in home exercise, Dr. Hartman pronounced the employee "completely capable of full-time employment."

The employee had been receiving treatment for panic attacks and depression from psychiatrist Dr. Randall LaKosky since January of 1991. On September 29, 1997, Dr. LaKosky

[1] Rehabilitation specialists Drs. Jeb Downs, Todd Holmes, and Edward Martinson; psychiatrists Drs. Randall LaKosky, Clyde Olson, and Judith Kashtan; orthopedic surgeons Drs. Robert Hartman and Robert Wengler; and family practitioner Dr. Paul Woods.

responded to a query from the employee's attorney, indicating that he found the employee's "Panic Disorder to be partially genetically determined," indicating also, however, that the disorder had been significantly exacerbated by a recent incident at home[2] and to some degree by the November 1996 work injury. Although he did not anticipate at that time that the employee's panic disorder would permanently disable her from all employment, Dr. LaKosky found the employee to be "significantly disabled in the past ten months because of the physical problems" and indicated that he would "continue to follow her with her panic disorder, which for most people, is generally a lifelong condition."

On January 8, 1998, the employee was examined by rehabilitation expert Dr. Todd Holmes for reevaluation of her need for rehabilitation regarding her chronic pelvic instability and back pain. Dr. Holmes diagnosed "[c]hronic cervical, thoracic, lumbosacral sprain/strain with somatic dysfunction in cranial, cervical, thoracic, lumbosacral spines, pelvis and rib cage" and a "[h]istory of anxiety disorder." He concluded that the mechanical dysfunctions relating to the employee's pelvic instability were causally related to her November 1996 work injury and that the employee's past physical therapy and her prescribed physical therapy were both medically reasonable and appropriate.

On January 17, 1998, the employee exacerbated her work-related injury in a fall and was taken to an emergency room, where x-rays revealed no fractures. The following month she returned to physical therapy "for chronic pelvic instability and back pain," which was continued with some success apparently at least into April 1998. On April 7, 1998, the employee exacerbated her symptoms in another fall sustained when her right leg gave out, and she was taken again to an emergency room. Later that month she fell two more times. On April 29, 1998, she was examined by orthopedic surgeon Dr. Robert Wengler, who diagnosed soft tissue injuries to the neck and lower back consequent to her November 1996 work injury. While considering the employee to be employable within the limits of her orthopedic problems, Dr. Wengler noted that "[h]er other medical and mental health problems will obviously be a major encumbrance with respect to her ultimate employability." While concluding that further treatment for her neck and low back condition was not necessary and that use of a sacroiliac garment and cane could be discontinued, Dr. Wengler recommended that the employee continue with her home exercise program and be restricted from lifting over ten pounds and from performing activities that required repetitive bending, stooping, or heavy pushing or pulling.

The employee was eventually released by Dr. Downs in May of 1998 to do only sedentary work, apparently full time. The employee's family practitioner, however, Dr. Paul Woods, concluded that she could do even sedentary work only two hours a day. Eventually, evidently through the efforts of QRC Kandise Garrison, a compromise was reached on July 23,

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[2] Looking out a window of her home, the employee saw a man in camouflage gear crawling across her yard with a dark object in his hand. She had become unable to breathe and had been taken by ambulance to an emergency room for treatment. Police had later identified the man in the yard and the dark object in his hand as a private investigator with a camera attempting to conduct surveillance for the insurer not on the employee but on her husband, apparently pursuant to an anonymous tip. The surveillance was subsequently discontinued.

1998, under which the employee was permitted to try an available sedentary sewing job four hours a day. The employee was apparently unable to tolerate the sewing job for even a day, however, and on September 16, 1998, Dr. Downs requested a recommendation from Dr. LaKosky as to whether or not the employee might benefit from a chronic pain program.

On September 21, 1998, the employee filed a Claim Petition, alleging entitlement to permanent total disability benefits continuing from August 14, 1998, to permanent partial disability benefits for at least a 3.5% whole body impairment related to her neck and a 7% whole body impairment related to her low back, and to permanent partial disability benefits for "instability and psychological [disability] unrated at this time," all due to her November 1996 work injury. Alternative to her permanent total disability claim, the employee also asserted a claim for retraining.

Dr. LaKosky saw the employee again on September 28, 1998, and noted that she was "looking gaunt, has lost weight," and had become "more agoraphobic. She hardly leaves the home. She's also quite frightened, keeps the drapes closed, the door locked, even when her husband is at home. She is also having a significant amount of pain." By mid October Dr. LaKosky had concluded that the employee's psychological condition was deteriorating due to chronic pain, and on October 20, 1998, he wrote to her attorney to ask if there was any way that, "pending the outcome of her legal issues," funding could be obtained to pay for her use of the drug OxyContin, which, although quite expensive, "leads to very little dependence on pain medication, is much safer," and would "make her significantly more able to conduct her daily life." The employee's attorney forwarded a copy of Dr. LaKosky's letter to counsel for the employer and insurer on October 23, 1998. Counsel for the employer and insurer apparently did not reply. About this same time the employee's panic attacks increased, spurred in part by another nonwork trauma,[3] and on November 9, 1998, Dr. LaKosky indicated in treatment notes that the employee was "not doing well" and "significantly worse from last time."

On November 18, 1998, the employee was examined for the employer and insurer by psychiatrist Dr. Judith Kashtan. Dr. Kashtan diagnosed panic disorder with agoraphobia, post-traumatic stress disorder [PTSD], somatoform pain disorder, passive dependent personality traits, musculoligamentous hip injury, migraine headaches, status post hysterectomy for endometriosis, and financial, marital, and other family conflicts. She concluded that the employee's November 1996 work injury was a relatively mild muscle strain and was not a substantial contributing cause of her current psychiatric problems or a basis for any psychological work restrictions or psychological treatment. Finally, Dr. Kashtan concluded that the employee had reached maximum medical improvement [MMI] relative to her November 1996 work injury and that her current symptoms were due to her pre-existing panic disorder and to PTSD.

On November 24, 1998, the employee was examined also by psychiatrist Dr. Clyde Olson. In his report the following day, Dr. Olson diagnosed anxiety disorder with panic features, PTSD, and depression. In a letter to the employee's attorney dated December 2, 1998, Dr. Olson

[3] The employee discovered one day one of her three dogs returned home barely alive.

indicated that the employee was subject to a preexisting "major psychiatric disorder," which Dr. Olson concluded had "very clearly" been aggravated by her November 1996 work injury.

On December 23, 1998, the employee was examined also by rehabilitation specialist Dr. Edward Martinson. She complained to Dr. Martinson of multiple symptoms, including the following: constant pain in the low back and bilateral buttocks; intermittent pain in the pubic and lower pelvic and abdominal region precluding sexual activity; pain bilaterally in the front of her upper legs; intermittent "burning" progressing to "tingling" radiating up the spine and also into the upper front of her right leg, sometimes extending to the sole of her right foot; generalized weakness of the legs, resulting in falls in conjunction with pain; urinary incontinence; constipation; and frequent waking at night secondary to pain. On physical examination, "[m]oderate - severe atrophy was noted bilaterally and symmetrically of gluteals with at least mild symmetrical atrophy bilaterally of [lower extremities]." Dr. Martinson diagnosed low back/back and bilateral leg pain secondary to the employee's November 1996 work injury, myofascial pain of the neck and back secondary to the former, and medical/surgical/psychiatric problems. He recommended in part that the employee "remain off work on a permanent basis per previous status."

On January 11, 1999, Dr. Woods reported to the employee's attorney that the employee "shows no evidence of improvement in terms of her chronic pain syndrome" and "remains unable to work at any job." On January 20, 1999, Dr. Downs reexamined the employee and concluded that the employee remained unemployable but "may have a better day in day out coverage if she were on a sustained-release product such as Oxycontin." Dr. LaKosky's treatment notes for January 26, 1999, reflect a continuing prognosis of severe anxiety, panic, and depression. By February 23, 1999, Dr. Woods had agreed that "it is the time to move her on to OxyContin." On March 17, 1999, Dr. Downs concluded that the employee was at MMI, stating that "[s]he has the most chronically unstable mechanics of her pelvis I have ever seen." Dr. LaKosky's notes for March 26, 1999, report that "[t]he only time [the employee] left her house [during the past two months] was to go grocery shopping a couple of times and to see me. She has all her curtains drawn and the house is very dark. She is phobic about all men of late and a lot of the women."

On April 13, 1999, Dr. Kashtan testified by deposition, in part that on examination she had found the employee to be of moderate impairment but able to function. She testified also that it was her opinion that the employee was not currently psychiatrically or psychologically restricted from returning to work and that her November 1996 work injury was not a substantial contributing cause of her current psychological condition, although her workers' compensation litigation was definitely aggravating her psychological symptoms.

On April 15, 1999, Dr. Olson also testified by deposition, in part that in his opinion the employee's November 1996 work injury was a substantial contributing cause of her current psychological condition. He suggested that the employee currently had chronic pain related to her work injury and that such "chronic pain in the presence of a previous existing posttraumatic stress and traumatic history is . . . more significant and more problematic." Dr. Olson testified also that in his opinion the employee was not currently employable from a psychiatric standpoint. He

suggested that, while it might be possible for the employee to be employed "in a very sheltered environment that we're very familiar with in . . . which there is not the stress, not the pressure, not the hassle of the common competitive workplace," "I don't see her as competitively employable." Dr. Olson indicated that the employee's prognosis was "extremely guarded" and that he expected "she's going to have ongoing and significant psychiatric difficulty" and is "going to suffer from lifelong psychological morbidity, certainly." He testified also that in his opinion the employee's increased care with Dr. LaKosky after her work injury was in part necessitated by the work injury and had been reasonable and necessary treatment. He concluded that, although the employee might well benefit by a chronic pain program, such an option would be "kind of a balancing act" because there was no local program for the employee to enroll in and removal to a location where there was such a program would increase her anxiety, and "I don't think she could tolerate it."

Finally, in deposition testimony on April 21, 1999, Dr. LaKosky stated his opinion that the employee's work injury with its subsequent pain syndrome had aggravated her panic disorder and caused a significant disabling depression. He testified also that he did not believe that the employee currently had the psychological energy or resources to benefit from a chronic pain program, although he did not object to a pain clinic program "down the road." He indicated that his treatment of the employee had "to a fairly significant and large extent" been necessitated by the employee's November 1996 work injury. He indicated also that her prognosis was currently "Guarded. Very guarded," and that, "[b]ased on the chronicity of the depression, the chronicity of the pain," she would probably require medications "indefinitely." Under cross-examination, Dr. LaKosky agreed also that the employee's use of the drug OxyContin "would possibly improve her condition" and that it was even "theoretically possible" that it could improve it even to the point "where [the doctor] felt she was before November of '97."[4]

The employee's September 1998 Claim Petition and a January 1999 Medical Request were consolidated for hearing on April 28, 1999. Issues at hearing included whether or not the employee had been permanently totally disabled since November 15, 1998, at the expiration of her temporary total disability two years after her work injury, and whether she was entitled to use of the drug OxyContin. Evidence received at the hearing included the testimony of QRC Garrison, who testified unequivocally that the employee is, in her opinion, permanently and totally disabled from all employment. By Findings and Order filed July 2, 1999, the compensation judge concluded in part that the employee was permanently and totally disabled from all employment, accepting Dr. LaKosky's opinion that the employee would not benefit from a chronic pain program but also accepting Dr. LaKosky's and Dr. Woods's recommendation of OxyContin for pain control, given that "the alternative is dependence on habit forming drugs." 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

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[4] We presume that counsel for the employer and insurer, in posing their query, intended reference to November 1996, the month of the work injury, rather than November 1997.

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 1 of his Findings and Order, the compensation judge listed the following as issues for determination: (a) permanent aggravation of the pre-existing psychiatric/psychological condition; (b) permanent total disability benefits; (c) permanent partial disability benefits; (d) authorization for a pain clinic; (e) certain nonmedication medical expense benefits; (f) medical expense benefits for the medication OxyContin; and (g) reimbursement to the intervenor. In contesting the judge's conclusion that the employee is permanently and totally disabled, the employer and insurer argue first that the compensation judge "fail[ed] to address all the arguments raised in the hearing and in the closing written brief." They contend that compensation judge "neglected to determine whether the Employee had reached maximum medical improvement and/or would improve if awarded the treatment regimen of Oxycontin." They contend that "[f]rom the failure of the compensation judge to list MMI/healing as an issue or even discount it in his memorandum, we can only assume he did not consider the argument." We are not persuaded.

There does not appear to have been any clear agreement among the parties and the judge that MMI was clearly at issue. However, we conclude that, to the extent that MMI was at issue, the judge implicitly decided the question in his determination on the issue of permanent total disability. See Schulte v. C. H. Peterson Constr., 278 Minn. 79, 83, 153 N.W.2d 130, 133-34, 24 W.C.D. 290, 295 (1967) ("a person is totally disabled if his physical condition, in combination with his age, training, and experience, and the type of work available in his community, causes him to be unable to secure anything more than sporadic employment resulting in an insubstantial income" (emphasis added)). Moreover, a determination of permanent total disability has both a medical and a vocational component, see McClish v. Pan-O-Gold Baking Co., 335 N.W.2d 538, 36 W.C.D. 133 (Minn. 1983), and a claim of permanent total disability benefits is usually more dependent on the employee's vocational potential than on his or her physical condition. See, e.g., Schulte, 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290. There is, after all, as the employee has argued, no statutory or case law provision requiring a finding of MMI prior to a determination that an employee is permanently and totally disabled. See, Diachok v. Westinghouse Electric Supply, slip op. (W.C.C.A. July 20, 1990). To the extent that the employer and insurer's argument here as

to OxyContin is interconnected with their argument as to MMI, and concerns more the prognosis for any improvement by use of the drug rather than the nature and degree of any anticipated improvement, it too fails. Some physical improvement might have been contemplated by the judge without disqualifying that the employee was still permanently totally disabled in the larger picture involving all of the Schulte factors. Because both parties and the judge did not expressly agree that either MMI or the mere question of whether some kind of benefit from OxyContin was specifically at issue, and because a finding of MMI is not necessarily required for a determination that the employee is permanently and totally disabled, we conclude that the judge did not err in not making a separate finding as to MMI or the mere likelihood of some kind of improvement with OxyContin.

Proceeding from those same arguments, the employer and insurer contend also that, whether or not the judge erred in failing to make specific findings as to MMI and the employee's prognosis with OxyContin, the judge's finding of permanent total disability was unsupported by substantial evidence, in that "further treatment has been prescribed which could improve her condition." They contend that the judge's finding of permanent total disability was premature in light of the judge's award of payment for the OxyContin, which they argue Dr. LaKosky expressly conceded could improve the employee's condition and "make her significantly more able to conduct her daily life," possibly even to where it was before her work injury. They argue that treatment with OxyContin might even result in enough improvement to permit the employee to benefit from a chronic pain program, which they argue Dr. LaKosky testified might be appropriate for the employee "at some time." Moreover, they argue, the employee should be held post injury to no greater standard than the "sporadic" standard of employability that she demonstrated prior to her injury. Again we are not persuaded.

As the compensation judge has noted in his Memorandum, the medical records in this case are voluminous. With few exceptions, those records describe an individual who is very chronically disabled, both physically and psychologically. Several physicians have causally related the physical disabilities directly to the employee's November 1996 work injury, and many of those doctors have seen those same work-related physical disabilities as current aggravators of the otherwise preexisting psychological disabilities. It is apparent from the employer and insurer's brief that they no longer contest the current totality of the employee's disability, only the permanence of that total disability, based on the prospect that the employee's use of OxyContin, as awarded by the judge, may result in enough improvement in her condition to allow her to work again. Although he did not address it in his memorandum, it is fairly evident in his Findings 34 and 35 that the compensation judge awarded the drug for no more than "pain control," and only in reliance on a reasonable inference from the opinions of Drs. Woods and LaKosky that "the alternative is dependence on habit forming drugs." There is, for instance, no evidence in the medical records that the use of OxyContin will result in any less instability of the employee's lower extremities, from which she has suffered chronically and increasingly since her work injury. Nor is there any clear evidence that the use of OxyContin will result in any direct diminishment of the employee's agoraphobic and panic disorder symptoms.

Particularly when they are viewed together as a group, the opinions of Drs. LaKosky, Martinson, Downs, Holmes, Woods, Wengler, and Olson, which are sufficiently reported above, amply support the compensation judge's conclusion that the employee is permanently totally disabled even with the prospect of possibly obtaining somewhat more regular and less dangerous pain relief through the use of OxyContin. Moreover, and very importantly with regard to the nonmedical factors to be considered in determining permanent total disability status, the employee's QRC also testified unequivocally that in her opinion the employee was permanently and totally unemployable. That the judge relied on the opinions of these experts over the opinions of Drs. Hartman and Kashtan was not unreasonable, given that there is no evidence that any of the opining experts was basing his or her opinion on any false premises. See Nord v. City of Cook, 360 N.W.2d 337, 342-43, 37 W.C.D. 364, 372-73 (Minn. 1985) (a trier of fact's choice between experts whose testimony conflicts is usually upheld unless the facts assumed by the expert in rendering his opinion are not supported by the evidence). Nor is Dr. LaKosky's opinion rendered insubstantial or the judge's decision erroneous by Dr. LaKosky's concession under cross-examination that it was "theoretically possible" that she could someday return to her pre-injury condition or could at least be capable of benefitting from chronic pain treatment. Because a determination of maximum medical improvement is not a requirement for a determination of permanent total disability, and because the judge's determination in this case was not at all unreasonable in light of the whole and very substantial medical and rehabilitation record, we affirm the compensation judge's conclusion that the employee is permanently totally disabled. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.