

HOWARD J. MAJERUS, Employee/Appellant, v. ENGLE FABRICATION, INC., and STATE FUND MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 27, 2000

No. [REDACTED SSN]

HEADNOTES

MEDICAL TREATMENT & EXPENSE - REFUSAL OF TREATMENT. There is insufficient evidence to support the compensation judge's determination that the employee "refused" reasonable medical treatment from and after December 16, 1998, where the employee's treatment records indicate that, after initially refusing to consider antidepressant medications, the employee began taking Trazadone prescribed by his treating physicians from and after August 1998, and where the employee, according to his treating psychologist, appeared to accept the idea of hypnosis in February 1998 and no further recommendation was made thereafter.

WAGES - BOARD & ALLOWANCES. Substantial evidence, including evidence that the employee received wages from the employer for his farm work on "company time," supports the compensation judge's determination that the employee's use of property owned by Mick Engle, the owner of Engle Fabrication, to park his mobile home and of use of storage space on the property, was not "board and allowances . . . made to an employee . . . as part of the wage contract" within the meaning of Minn. Stat. § 176.011, subd. 3.

Affirmed in part and reversed in part.

Determined by: Johnson, J., Wheeler, C.J., and Rykken, J.
Compensation Judge: Peggy A. Brenden

OPINION

THOMAS L. JOHNSON, Judge

The employee appeals from the compensation judge's finding that he unreasonably refused consistent use of anti-depressant medications and/or a trial of hypnosis for treatment of his emotional/psychological condition, and the judge's denial of permanent total disability benefits from and after December 16, 1998 on that basis. The employee also appeals from the compensation judge's determination that the employee's weekly wage on the date of injury was \$478.82, and her determination that use of the land to park his mobile home and use of buildings for storage on a farm owned by the employer was not part of the wage contract, and was not includable as "board or other allowances" under Minn. Stat. § 176.011, subd. 3. We affirm in part and reverse in part.

BACKGROUND

The employee, Howard J. Majerus, began working as a laborer for the employer, Engle Fabrication, Inc., in February 1990. The employee and Mick Engle, the owner of Engle Fabrication, Inc., had known each other since childhood. The employee worked primarily in Engle's cement business and gravel business, but also worked in the employer's fabrication shop as needed.

Sometime in 1991, the employee lost his home through foreclosure. When told about his situation, Mr. Engle offered to loan the employee money for a down payment on a mobile home. Mr. Engle also told the employee he could park the mobile home on property, formerly a farm, where Mr. Engle's gravel business was located, and could use other buildings on the property for storage and parking. After the employee moved out to the farm, the employee and Mr. Engle began to make improvements, including cleaning up the property, repairing and improving buildings, and putting up fencing and pens.

In the spring of 1992 or 1993, Mr. Engle purchased four steers and began raising alfalfa hay and oats on the 120 acre farm. Mr. Engle eventually had about 68 head of cattle, a horse, a mule, four miniature donkeys and about 20 chickens on the farm. The employee was responsible for the livestock and assisted with other farm work including planting and harvesting of crops and property maintenance and improvements.

On June 15, 1996,¹ the employee sustained a crush injury to the right ankle while operating a skid loader in the course and scope of his employment with Engle Fabrication. The employee subsequently developed reflex sympathetic dystrophy in the right leg and foot as a consequence of the work injury. (See unappealed finding 13.) He has significant physical restrictions relating to the right foot and ankle. The employee has also developed disabling chronic pain, depression and anger causally related to the June 15, 1996 work injury. (Unappealed finding 16.)

The employee filed claim petitions on August 15, 1997 and January 23, 1998, seeking, *inter alia*, permanent total disability benefits and asserting underpayment of wage loss benefits. The case was heard by a compensation judge at the Office of Administrative Hearings on April 1 and 2, 1999. The judge found, in an unappealed finding, that the employee was permanently and totally disabled from June 14, 1996 through the date of hearing as a result of the work injury. (Finding 17.) The judge found, however, that "the evidence fail[ed] to establish the employee's refusal to attempt a consistent use of anti-depressants and/or a trial of hypnosis from December 16, 1998 to the date of hearing . . . [was] reasonable," and she dismissed the employee's claim for permanent total disability benefits with prejudice, from and after December 16, 1998. The compensation judge further found the use of the employer's land and storage space on the property were not part of the employee's wage contract and not includable in calculating the employee's weekly wage. The employee appeals.

¹ The compensation judge refers to a June 14, 1996 date of injury. The parties previously stipulated to a date of injury of June 15, 1996. (May 1996 Stipulation for Settlement.) The June 15 date is consistent with medical records reflecting initial treatment at the Douglas County Hospital emergency room on June 15, 1996. (Ex. 8.)

STANDARD OF REVIEW

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). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

Refusal of Reasonable Medical Treatment

The compensation judge found that although the employee was permanently and totally disabled from and after June 15, 1996, he had not complied with reasonable treatment recommendations and was not entitled to permanent total disability benefits from and after December 16, 1998. She specifically found the employee had been reluctant to take anti-depressants and inconsistent in taking anti-depressants recommended by his health care providers, and had refused to undergo hypnosis. (Finding 18.) The judge, nonetheless, awarded permanent total disability benefits from June 14, 1996 to December 15, 1998, concluding it was reasonable for the employee to forego a disciplined use of anti-depressants and/or hypnosis during this time because: (1) a reasonable period of time was appropriate to determine whether the employee's pain, depression and anger could be effectively controlled without the use of anti-depressants and/or hypnosis; (2) Dr. Riedel needed to establish a solid relationship with the employee before introducing treatment proposals to which the employee was adamantly opposed; and (3) after mid-August 1998, the insurer refused to pay for prescribed anti-depressants and pain medications. Until payment was assured, the employee's inconsistent use of medications was reasonable. After about December 15, 1998, the employee's health insurance paid his medication expenses. (Unappealed finding 20.) The compensation judge further concluded the evidence failed to establish the employee's refusal to attempt a consistent use of antidepressants and/or a trial of hypnosis was reasonable after December 16, 1998. The employee contends that the compensation judge's findings regarding noncompliance with recommended treatment after December 16, 1998 are not supported by substantial evidence. We agree.

Workers' compensation benefits may be suspended if the employee refuses reasonable medical treatment.² Dotolo v. FMC Corp., 375 N.W.2d 25, 28, 38 W.C.D. 205, 208

² Workers' compensation benefits may be *suspended* if the employee refuses reasonable medical treatment. The employee is entitled to *reinstatement* of benefits from the time the employee accepts the treatment. Dotolo, 375 N.W.2d at 28, 38 W.C.D. at 208 (emphasis added). Here, the compensation judge dismissed the employee's claim from and after December 16, 1998,

(Minn. 1985); Reese v. Preston Marketing Ass'n, 274 Minn. 150, 142 N.W.2d 721, 23 W.C.D. 810 (1966). The burden of proof is on the employer and insurer. McShane v. Hudson Foods, Inc., 55 W.C.D. 455, 462 n.3 (W.C.C.A. 1996); Meyer v. Old Dutch Foods, slip op. (W.C.C.A. June 23, 1997).

Anti-depressant medication was first prescribed on November 26, 1996, by Dr. Florell, an internist, who has treated the employee for cardiomyopathy since 1993. Dr. Florell prescribed Paxil, 20 mg per day, for depression. On January 20, 1997, the employee was examined by Dr. Thomas McPartlin, a neurologist, who recommended changing from Paxil to Serzone. The next day Dr. Florell took the employee off Paxil, noting the employee had been taking only one every four days, and prescribed Serzone, 50 mg daily, increasing to 100 mg after one week. The employee developed side-effects, including headaches and diarrhea, when he tried to increase to 100 mg, and Dr. Loren Pilling, who was then seeing the employee, recommended Elavil (amitriptyline) or Zoloft instead. On February 7, 1997, Dr. Florell took the employee off Serzone, and prescribed Elavil, 25 mg before bed. The employee was admitted to the North Pain Institute, under the care of Dr. Pilling, on March 3, 1997 and continued to take Elavil while participating in the pain clinic program through March 26, 1997. In April 1997, the employee discontinued use of Elavil, taking Tylenol p.m. for sleep instead.

The employee began treating with Robert Riedel, a licensed psychologist, on July 14, 1997. The doctor diagnosed chronic pain syndrome with major depression. At that time Dr. Riedel noted the employee had tried various psychotropic medications in the past, but did not like their side-effects and refused to consider taking them. Goals included working with the employee to accept medical intervention. On July 24, 1997, Dr. Riedel noted he “tried to talk to [the employee] about the possible use of hypnosis to assist him in dealing with his pain.” The employee had a bad experience with hypnosis at a fair and did not want to consider it, although Dr. Riedel believed he would probably be a good hypnotic subject. (Ex. 22: 7/14/97, 7/24/97.) The employee continued to refuse anti-depressants and pain medications, although he was encouraged to consider their use by both Dr. Florell and Dr. Riedel. (See, e.g., Ex. 9: 12/30/97; Ex. 22: 8/13/97, 11/18/97, 12/1/97.) On December 30, 1997, Dr. Florell noted the employee refused any other psychotropic or neurotrophic medications but stated they probably wouldn't help anyway because of their side effects. (Ex. 9.)

On January 27 and February 3, 1998, Dr. Riedel again discussed hypnosis with the employee, noting he spent a great deal of time trying to get the employee to accept the idea that with properly used hypnosis he could manage some of his pain without the use of medication. At the conclusion of the February 3 session, Dr. Riedel commented “I will not be able to see him next

with prejudice, stating “[t]he employee may reassert a claim for permanent total disability benefits if, after cooperation with reasonable treatment recommendations, he is able to show a causal relationship between his injury and an inability to find work providing more than sporadic employment resulting in insubstantial income.” (Orders 6, 7.) The decision of the compensation judge is, accordingly, modified to conform to the supreme court's decision in Dotolo. We further note the standard is whether “the recommended treatment would probably result in significant improvement of employee's mental state whether or not he is able to work.” Dotolo, id.

week, which is unfortunate because I think I got him to the point where he accepted this idea.” (Ex. 22: 1/27/98, 2/3/98.)

On March 10, 1998, Dr. Florell prescribed Trazodone, 25 mg at bedtime, at the request of Dr. Riedel.³ The employee continued to resist taking medications, but on April 28, 1998, agreed to consider going to see Dr. Florell and trying Trazodone. Finally, on August 3, 1998, the employee saw Dr. Florell requesting something for his pain. Dr. Florell noted the employee was obviously depressed and was “ready to do something different.” The doctor told him to take the Trazodone, 25 mg at bedtime, increasing to 50 mg after four days. Dr. Florell also prescribed Oxycontin 10 mg twice daily for pain control. Unfortunately, the insurer then refused to pay for the medications. (Ex. 9: 3/10/98, 8/3/98; Ex. 22: 4/21/98, 4/28/98, 7/7/98, 8/4 - 8/25/98.)

The employee returned to Dr. Florell on August 26, 1998. He reported taking 25 mg Trazodone for sleep, but had run out of Oxycontin. The doctor noted the employee was a little constipated with the medications. Although the insurer refused to pay for a refill, Dr. Florell wrote a three month prescription for Oxycontin, increasing the dose to 20 mg, noting the employee was taking only one Oxycontin at night because it made him drowsy. The employee returned to Dr. Florell on November 18, 1998. The doctor noted the employee was using Trazodone, 25 mg at bedtime and Oxycontin, 20 mg once daily. In the meantime, Dr. Riedel encouraged the employee to use his health insurance coverage to pay for his medications. On December 15, 1998, Dr. Riedel reported the employee “has his insurance realigned now.” (Ex. 22: 12/15/98; see Ex. 22: 8/18/98, 8/25/98, 9/8/98, 10/6/98.)

On January 13, 1999, the employee was seen by Dr. John Bowar at the Abbott Northwestern Chronic Pain Rehabilitation Program, at the request of Dr. Riedel. Dr. Bowar noted that although the employee had been very hesitant about the use of antidepressant medications, he was now willing to maintain on Trazodone, 25 mg at bedtime. (Ex. 19.) The employee was also seen by Dr. Thomas G. Gratzler on February 3, 1999 at the request of the employer and insurer. Although Dr. Gratzler opined the employee had been noncompliant with antidepressant treatment, he noted the employee was continuing to take 25 mg Trazodone at night. He further noted that Dr. Riedel had not made compliance with psychiatric medications a condition of his treatment. (Ex. 21.)

At the hearing, the employee testified that he was currently taking two medications prescribed by Dr. Florell: one for depression and one for pain. He stated that it had been worked out so that he could take them “without too bad side effects” and he felt he was “doing pretty darn good” on the medications he now had. (T. 152, 155-56.)

While the employee was clearly opposed to the use of medications from at least July 1997 to August 1998, the evidence is insufficient to support the finding that the employee “refused” prescribed anti-depressant medications and/or hypnosis from and after December 16,

³ As a licensed psychologist, Dr. Riedel is not able to prescribe medications. Because of concerns about drug interactions, Dr. Florell coordinates all of the employee’s medication prescriptions.

1998. Compare Sopsic v. Norwest Corp., 42 W.C.D. 228 (W.C.C.A. 1989); Bushey v. American Hoist & Derrick, 40 W.C.D. 1159 (W.C.C.A. 1988).

Although both Dr. Riedel and Dr. Florell are aware that the employee has not increased Trazadone beyond 25 mg at bedtime, there is no indication that either doctor has directed or required the employee, during the time period after December 16, 1998, to increase the amount of Trazadone he is taking. Dr. Riedel commented, in fact, that the employee has to feel supported by the people he trusts, and opined there would be a very low chance of success if treatment is forced as opposed to getting the employee to the point where he sees its value and is ready to fully participate. (Ex. 31, Vol 2: at 61.) While the employee's consistent compliance with the medication regimen prescribed by Dr. Florell may be a concern, both Dr. Riedel and Dr. Florell are aware of this and appear to be monitoring the employee's medication use. (See, e.g., Ex. 22: 7/7/98.)

With respect to hypnosis, the evidence indicates that Dr. Riedel discussed hypnosis with the employee on two occasions as an alternative method of pain management. There is nothing to indicate that Dr. Riedel did anything more than discuss the "possibility" with the employee. On February 3, 1998, Dr. Riedel believed the employee was "at the point where he accepted this idea." (Ex. 22: 2/3/98.) There is nothing in the record to indicate that Dr. Riedel has raised the issue or pressed the employee to consider hypnosis at any time since then. In August 1998, the employee requested pain medication from Dr. Florell, and appears to be willing to take the Oxycontin prescribed by Dr. Florell to help control his pain.

We cannot say, under the circumstances of this case, that the employer and insurer have met their burden of establishing an unreasonable refusal of medical treatment likely to result in significant improvement of the employee's mental condition, as required by Dotolo. The evidence is insufficient to support the finding that the employee "refused" recommended medical treatment after December 16, 1998, warranting a suspension of benefits. We, therefore, reverse the compensation judge's denial of permanent total disability benefits after that date.

Average Weekly Wage

The employee also contends that neither substantial evidence or the law support the compensation judge's calculation of the employee's pre-injury weekly wage. He argues that Minn. Stat. § 176.011, subd. 3, requires inclusion of the value of the employee's use of the Engle property in the employee's weekly wage. We disagree.

Minn. Stat. § 176.011, subd. 3, provides, in pertinent part,

Where board or allowances . . . are made to an employee in addition to wages as a part of the wage contract they are deemed a part of earnings and computed at their value to the employee.

The employee contends that use of the Engle property to park his mobile home and the use of storage space on the property is includable in his weekly wage as compensation for his work on the farm. The compensation judge concluded the arrangement between Mr. Engle and the employee for the employee's use of the property was personal, and was not part of the wage contract. There is substantial evidence to support the judge's decision.

In 1991, the employee and his wife lost their home due to foreclosure. The employee explained his situation to Mr. Engle, who loaned the employee \$1,700.00 for a down payment on a mobile home. Mr. Engle told the employee he could park the mobile home on farm property he owned and could use various buildings on the property for storage and parking. At the hearing, Mr. Engle testified that his offer of use of the property to the employee was personal, and was not in exchange for the employee's labor on the farm. He explained that he wasn't using the property for anything, and the employee needed help at the time.

Mr. Engle further testified that the employee was paid wages by the employer, Engle Fabrication, for the cattle and farm work, stating the employee was "on the clock" and wrote in his own time when he was working on the farm. (T. 218-226, 259 -261, 263-64.) The employer and insurer submitted copies of the employee's time cards for the six months prior to the injury. The time cards reflect hours working, generally, at the farm, hauling manure, calving, farming oats and haying. The time cards also show days of more than eight hours that included farm work. (Ex. 38.) Dorothy Sills, the office manager for the employer, also testified that the work the employee did at the farm was included on his time cards, which the employee filled out. (Ex. 53 at 40-41.)

The employee testified he "donated" a lot of time on the farm on Sundays and after work, but also testified he was paid by the employer for work he did on the farm during work hours, including Saturdays, and, on occasion, after normal working hours, when Mr. Engle told him to stay "on the clock." (T. 54-57.) The employee's wife also testified that the employee's work on the farm on week days and Saturdays was "paid on company time," although the employee also did farm work, such as feeding livestock, on Sundays and holidays. She further testified that field work in the summer included evening and sometimes Sunday work, but was sometimes done on company time, and she could not say positively if the employee was paid or not. (T. 166-67.)

Based on this evidence, the compensation judge found the employee was paid by the employer for most of the time he spent on farm-related work activities. She further concluded that although the employee did perform some farm work "off the clock," there was insufficient evidence to determine the amount of time the employee spent "on the clock" as opposed to off. (Unappealed finding 8.) The compensation judge also found the arrangement between Mr. Engle and the employee when the employee moved on to the farm was personal - - "one person helping another person out of a financial crisis," and concluded that the evidence failed to establish that the employee's residence on the farm was "board or allowances . . . made to an employee . . . as a part of the wage contract" within the meaning of Minn. Stat. § 176.011, subd. 3. While differing inferences could be drawn from the record, there is substantial evidence to support the compensation judge's decision, and we must, accordingly, affirm. Minn. Stat. § 176.421, subd. 1

(1992); Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984).