DARLYNE BAUER, Employee, v. LINDER'S GREENHOUSE and FLORIST'S MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 13, 2001

No. [REDACTED SSN]

HEADNOTES

RESTRICTIONS - SUBSTANTIAL EVIDENCE. Substantial evidence, including the results of the employee's functional capacity evaluation, well-founded expert medical opinion, and lay testimony supports the compensation judge's findings as to the employee's work restrictions. There is no requirement that work restrictions be based solely upon objective medical evidence, and subjective complaints of pain can reasonably form the basis for the determination of restrictions.

MMI - Service of MMI. In the absence of any evidence to show that the applicable written MMI opinion was received by or served on the employee, the compensation judge did not err in finding that the 90-day post-MMI period did not begin to run until the date of hearing.

Affirmed.

Determined by Pederson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: Joan G. Hallock

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's award of temporary partial disability compensation from November 4, 1999 through June 11, 2000 and from July 25, 2000 through the date of hearing, and temporary total disability compensation from June 12, 2000 through July 24, 2000. We affirm.

BACKGROUND

The employee, Darlyne Bauer, was born in 1944 and is presently 57 years old. She first worked for the employer, Linder's Greenhouse, in the 1980s but left for a time to work selling real estate. In 1995 the employee returned to work at Linder's as a plant technician at the employer's site at Lake Elmo, Minnesota. This job involved general labor in the planting and propagating of garden plants, general greenhouse labor, cleaning around greenhouses, and filling greenhouse benches with pots. The job required constant standing and a great deal of walking. (T. 16-20, 46.)

On June 18, 1998 the employee sustained an admitted personal injury at work when her foot "rolled" off the edge of a slippery concrete slab following a rainstorm and she fell and twisted her ankle. (T.21.)

When she arrived home, the employee noticed that her foot was very swollen. She went to the River Falls Hospital in River Falls, Wisconsin where she was evaluated by Dr. T. F. Steinmetz, M.D. X-rays showed that she had broken a bone in her ankle and a bone in her foot. The employee was advised to return to the clinic in a few days. Upon returning, she was diagnosed with right distal fibula and right proximal fifth metatarsal fractures by Dr. Paul R. McMillan, M.D. X-rays on June 20, 1998 showed a non-displaced fracture of the right lateral malleolus and at the base of the fifth metatarsal. The employee was fitted with a short leg cast. (T. 23-24; Exh. D.)

The employee returned to see Dr. McMillan on June 26, 1998, and new x-rays indicated that the fracture was stabilizing. She was advised to return in three weeks. On July 17, 1998, the employee met with Dr. Steinmetz and was placed in an air cast. If she continued to experience problems with ambulation, she was told to return to the clinic so that she could be given an equalizer. The employee did return for an equalizer. (Exh. D.)

The employee's precise return to work date is unclear but the evidence shows without dispute that the employer initially permitted her to return to her job working part-time hours, as needed, in order to avoid excessive standing. (T. 34-36, 48-49.)

The employee was seen by Dr. Steinmetz again on August 7, 1998. She was continuing to experience a fair amount of tenderness despite use of the equalizer. It was recommended that she continue under work restrictions over the next three to four weeks. (Exh. D.)

The employee next met with Dr. Steinmetz on September 3, 1998. She was continuing to experience pain in her foot and was still using the equalizer. Dr. Steinmetz recommended that she be seen by an orthopedic physician. (Exh. D.)

The employee was evaluated by Dr. William T. Schneider, M.D., an orthopedic surgeon with Saint Croix Orthopedics, on September 4, 1998. After reviewing her x-rays, Dr. Schneider diagnosed her condition as a Weber-type C fracture of the lateral malleolus and a fracture of the proximal fifth metatarsal. He noted that both fractures were minimally displaced, but that they were probably healing "just fine." He recommended activity restrictions and immobilization. He felt that it was possible the fibular fracture would go on to a nonunion, but that it would be expected to be asymptomatic. He felt that the fifth metatarsal fracture had more potential to be problematic. Dr. Schneider recommended that the employee return in two months for x-rays of the foot and ankle to confirm healing. A work release form was signed on the same date authorizing the employee to work with no climbing or walking, standing limited to 1-3 hours and lifting limited to 10-25 pounds. (Exh. D.)

The employee was again evaluated by Dr. Schneider on October 30, 1998. She continued to experience swelling and described minimal tenderness at the fibular fracture site and

tenderness at the base of the fifth metatarsal. Dr. Schneider advised that if she continued to be symptomatic after several months he would recommend insertion of a lag screw. (Exh. D.)

The employee next met with Dr. Schneider on January 8, 1999. Dr. Schneider noted that the employee indicated that she was working in a greenhouse setting on hard floor surfaces throughout the day. She stated that she could tolerate the first four days of work per week, but by each Friday had been having significant swelling in the lateral foot and an aching sensation in the ankle. For this reason, she was taking Fridays off. Dr. Schneider felt she was not staying within the restrictions he had recommended. The employee stated that the employer did not have work available for her that would mainly involve sitting tasks. It was Dr. Schneider's opinion that if there was sedentary work available, she could probably tolerate a forty hour work week. (Exh. D.)

The employee met again with Dr. Schneider on February 26, 1999. She was not doing well and was working long hours on her feet despite the restrictions he had outlined. Dr. Schneider took x-rays of her foot and it was his impression that the fractures looked solidly healed. He recommended eight sessions of physical therapy and completed a work ability slip recommending sedentary work with no more than one to three hours of standing and walking per day. (Exh. D.)

On May 7, 1999, the employee returned to Dr. Schneider who diagnosed residual, unexplained right foot pain ten months after an undisplaced bimalleolar fracture. He recommended a bone scan to see if there was any evidence of a residual that was being missed and also recommended that she be seen by Dr. Glenn Ciegler, an orthopedic surgeon, for a second opinion. The employee was again given restrictions indicating that she could not walk or stand for more than one to three hours per day, could not lift over ten to twenty-five pounds and that she should rest for five to ten minutes every hour. (Exh. D.) The bone scan, performed on May 19, 1999, was read as negative and showed no true hot spots in either the right or left foot or ankles. (Exh. D.)

On June 1, 1999, the employee was evaluated by Dr. Ciegler, who diagnosed a possible peroneal tendon injury and resolving sural nerve injury. He recommended an ultrasound to evaluate the peroneal tendon and also discussed surgical intervention as another option. The doctor noted that the employee was at that time uninterested in surgical intervention. (Exh. D.) On June 10, 1999, the employee underwent an ultrasound of the right foot. According to the test report, the peroneal tendon was within normal limits. (Exh. D.)

The employee returned to meet with Dr. Ciegler on June 11, 1999. Dr. Ciegler told her that the ultrasound results were negative. He also informed her that even though the results were negative, this did not necessarily mean that she did not have a tear. According to the report, Dr. Ciegler recommended that the employee reconsider surgery. (Exh. D.)

On June 29, 1999, the employee again met with Dr. Ciegler. She was continuing to have problems standing on concrete to perform her job duties. At that point, Dr. Ciegler no longer felt surgery would be beneficial. He recommended an injection into the subtalar joint. He told her to continue with restrictions and return in three weeks. (Exh. D.)

On July 20, 1999, the employee returned to see Dr. Ciegler. The employee felt that the subtalar injection did not provide any relief of her symptoms. Dr. Ciegler recommended an MRI scan. He informed the employee that if the results of the MRI-scan did not show any significant findings, he would release her to return to work without restrictions. (Exh. D.) On July 26, 1999, an MRI scan of the right ankle was performed which was read as unremarkable, without visualization of osteochondral, musculotendinous or ligamentous abnormalities. (Exh. D.)

The employee returned to see Dr. Ciegler on July 30, 1999. She informed Dr. Ciegler that her foot did not swell up during the day but would balloon up at night. Dr. Ciegler indicated that he did not have treatment options to offer the employee except to see a chronic pain specialist. Dr. Ciegler also released the employee for full work without restrictions as of Monday, August 2, 1999. (Exh. D.)

Following the work release by Dr. Ciegler the employer told the employee that the only work that was available required continual standing, but she would be permitted to continue to work part time hours until November 1999, when she would be expected to work full time. (T. 49-52.)

On October 30, 1999 Dr. Schneider prepared a report stating that the employee had reached maximum medical improvement. (Exh. D.) The employee conceded that this report was served on her on November 25, 1999. (T. 13-14.)

The employee was eventually referred to Dr. Matthew Monsein, a chronic pain specialist with Abbott Northwestern Hospital. She was evaluated by Dr. Monsein on November 4, 1999. His impressions were: 1) status post fifth metatarsal and lateral malleolus fracture with x-ray evidence of complete healing, and 2) persistent right foot pain, most likely on the basis of a neuropathic etiology. It was Dr. Monsein's opinion that the employee seemed very stable and showed no evidence of pre-existing psychiatric or psychological problems. He did not feel there were any significant secondary gain factors involved in the patient's clinical presentation. It was his opinion that the employee's continued pain was likely pain based on some neuropathic process, which he felt was "most likely due to dysfunction of the small peripheral nerves." He recommended a trial of Zostrix cream and trial use of a TENS unit. With respect to the question of work restrictions, Dr. Monsein opined that the employee should self-limit her work. He opined that she would need to find a job that she could tolerate, and that if she could not tolerate standing for forty hours per week, she should find a job that would either allow her to sit or to avoid working on concrete for extended periods of time. He also felt that a formal behavioral pain management program was not necessary or indicated. (Exh. B.)

The employer did not consider self-limited restrictions appropriate, and the employee requested that Dr. Monsein clarify her restrictions. On November 15, 1999 Dr. Monsein restricted her to 20 to 30 hours per week in her current job, noting that she could work full time if the job could be modified to require less standing. (Exh. B.)

On November 29, 1999, the employee filed a claim petition seeking continuing temporary partial disability compensation from and after November 4, 1999. (Judgment Roll.)

The employer did not accept the restrictions outlined by Dr. Monsein and requested that the employee choose between resuming full hours as a full-time employee, accepting an alternative job as a part-time employee without benefits, or resigning. The employee did not select one of these options, indicating that she could continue to work part time at her full-time job (with benefits), as she was not able to tolerate being on her feet for five to seven hours per day. On December 12, 1999 the employer notified the employee that she would be terminated from full-time employment and placed on part-time employment status as of December 31, 1999. (T. 52-53.)

A functional capacities evaluation was conducted at the request of Dr. Monsein on February 9 and 10, 2000. The evaluation was considered valid and resulted in a recommendation that the employee work in light duty employment, defined as involving no more than seven hours per day standing. The evaluation also reported that the employee could not tolerate standing on cement for a full work day and suggested that the employee might benefit from anti-fatigue mats to increase her standing tolerance. (Exh. B.)

In a report dated February 24, 2000, Dr. Monsein opined that the employee had now reached maximum medical improvement. (Exh. B.) The employee continued to work in a part-time capacity for the employer until June 2000, when she was laid off as a seasonal part-time worker. (T. 41, 54.)

Without the assistance of a formal rehabilitation plan or provider, the employee had begun casually searching for other work within her restrictions shortly after her injury and continued to search for work on her own after her layoff. On July 12, 2000 the employee found a temporary job assignment through a temp agency at which she had continued to work through the date of the hearing below, August 25, 2000. (T. 32-33.)

A hearing was held on the employee's claim petition before a compensation judge at the Office of Administrative Hearings on August 25, 2000. Following the hearing, the compensation judge awarded temporary partial disability compensation from November 4, 1999 through June 11, 2000 and from July 25, 2000 through the date of hearing, and temporary total disability compensation from June 12, 2000 through July 24, 2000. The employer and insurer appeal.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

Among other findings not appealed, the compensation judge accepted the restrictions offered by Dr. Monsein and found that the employee was under restrictions of four hours per day, 20 hours per week at work for the period beginning November 5, 1999. She found that the employee's current restrictions were those set forth in the employee's February 2000 functional capacity evaluation. The judge further found that the employee had attained maximum medical improvement from her work injury on February 24, 2000, again consistent with the opinion of Dr. Monsein, but that there was no evidence that the employee was served with the report of that physician evidencing attainment of maximum medical improvement until the date of the hearing below.

On appeal, the employer and insurer first argue that the compensation judge erred in finding that the employee was under medical restrictions during the periods at issue as the restrictions were based solely upon subjective complaints of pain, without corroborating objective medical evidence.

There is no requirement in the law that a physician's work restrictions be based on objective findings. *See, e.g.*, Muglli v. Marvin Windows, *slip op.*, (W.C.C.A., March 10, 1999); Thompson v. Waco Scaffolding & Equip., *slip op.*, (W.C.C.A. Feb. 7, 1994); Stender v. Maid of Scandinavia, *slip op.*, (W.C.C.A. Mar. 4, 1993); Shoultz v. Natco Automatic Transmission, *slip op.*, (W.C.C.A. Apr. 14, 1993). Subjective pain complaints may form the basis for a finding that an employee is subject to work restrictions, where supported by well-founded medical opinion that such restrictions are appropriate in light of the employee's medical condition resulting from a work-related injury. Here, there was adequate medical evidence to support the compensation judge's findings, including the expert opinion of Dr. Monsein and the results of the February 2000 functional capacities evaluation. We, therefore, affirm the compensation judge's findings as to the appropriate restrictions. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985); Minn. Stat. § 176.421, subd. 1(3) (1992).

The employer and insurer next contend that the compensation judge erred in awarding temporary total disability compensation for the period June 12, 2000 to July 24, 2000, arguing that

this period was more than 90 days subsequent to the attainment of maximum medical improvement (MMI), and that the employee was therefore ineligible for temporary total disability compensation for that period pursuant to Minn. Stat. §176.101, subd. 1(j), which provides, in pertinent part:

> (j) Temporary total disability compensation shall cease 90 days after the employee has reached maximum medical improvement . . . For purposes of this subdivision, the 90-day period after maximum

> medical improvement commences on the earlier of: (1) the date that the employee receives a written medical report indicating that the employee has reached maximum medical improvement; or (2) the date that the employer or insurer serves the report on the employee and the employee's attorney, if any. . .

On October 30, 1999 Dr. Schneider prepared a report stating that the employee had reached maximum medical improvement. (Exh. D.) The employee conceded that this report was served on her on November 25, 1999. (T. 13-14.) However, the compensation judge found that the employee had not reached maximum medical improvement until February 24, 2000, consistent with the opinion of Dr. Monsein. The employer and insurer on appeal have not argued for reversal of the finding that MMI did not occur until February 24, 2000. The compensation judge properly held that service of medical reports alleging MMI on prior dates not accepted by the judge did not meet the employer and insurer's burden to show that the employee had receipt or service of a written report evidencing attainment of MMI for purposes of Minn. Stat. §176.101, subd. 1(j).

In the opening statements, the employee's attorney denied that the employee had been served with Dr. Monsein's written MMI report and refused to so stipulate. Despite the employee's refusal to so stipulate, the employer and insurer offered no evidence of the service at the hearing, whether by exhibit or testimony. The employee was not asked about receipt or service of Dr. Monsein's written report during either direct testimony or cross-examination.

The employer and insurer claim on appeal that there was evidence of such service in the files of the Department of Labor and Industry in the form of a copy of a letter filed with the Department which indicated service was also being made on the employee. They argue that the compensation judge either overlooked this evidence or failed to give it proper weight in reaching her finding on the issue. Where service or receipt of a written MMI opinion is in controversy, parties should submit specific evidence in the form of an exhibit or testimony, and not rely on documents which are presumed to be in the files of the Workers' Compensation Division of the Department of Labor and Industry. We are cognizant that pursuant to Minn.R. 1415.2900, subp. 7B(3), relevant portions of the division's official file may be made part of the record for consideration in the disposition of an issue at hearing. Nonetheless, where such a document is present in the files, but not made an exhibit or otherwise pointed out specifically to the compensation judge, we do not believe it constitutes error for a judge to overlook it in deciding the issues presented.

Notwithstanding the foregoing viewpoint, we have here reviewed the DOLI file in its entirety, including portions which were scanned into computer file images for space reduction by the Department of Labor and Industry. We find no document in that file evidencing the service of the February 24, 2000 report of Dr. Monsein on the employee.

In the absence of any evidence to show receipt by or service on the employee of the relevant MMI report the compensation judge did not err in finding that the 90-day post-MMI period did not begin to run until the date of hearing.

The employee's attorney submitted no brief in conjunction with this appeal. Accordingly, we decline to award attorney fees on appeal.