

SUBRYAN DHANNU, Employee/Cross-Appellant, vs. ABM JANITORIAL SERV. and CNA - RSKCO, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 4, 2001

No. [REDACTED SSN]

HEADNOTES

CAUSATION. Substantial evidence, including the employee's testimony, supports the compensation judge's finding that the employee sustained a low back injury after falling during the work injury that also resulted in a broken toe.

TEMPORARY BENEFITS. Where the employer and insurer raised defenses of failure to conduct a job search and voluntary withdrawal from the labor market in their response to the employee's objection to discontinuance, their pre-trial statement, and in the opening statement at the hearing, the compensation judge erred by failing to address these issues in the findings and order. Award of temporary total disability benefits is vacated and the matter remanded for specific findings.

MAXIMUM MEDICAL IMPROVEMENT. Substantial evidence, including expert medical opinion, supports the compensation judge's finding that the employee had reached maximum medical improvement.

Affirmed in part, vacated and remanded in part.

Determined by: Rykken, J., Pederson, J., and Johnson, J.
Compensation Judge: Ronald E. Erickson

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's finding that the employee had sustained a low back injury as a result of his December 30, 1998, work injury, and that the employee was entitled to temporary total disability from March 25, 1999, through June 7, 2000, and also argue that the compensation judge failed to address the employer and insurer's defenses of voluntary withdrawal from the labor market and failure to perform a diligent job search. The employee cross-appeals the compensation judge's finding that the employee had reached maximum medical improvement. We affirm in part and vacate and remand in part.

BACKGROUND

Subryan Dhannu, the employee, began working as a custodian for ABM Janitorial Services, the employer, in 1988. On December 30, 1998, the employee sustained an admitted injury to his left foot. The employee was pushing a large brute barrel, a 33-gallon drum mounted

on wheels, up a ramp in order to empty it when it fell and struck his left foot. On that date, the employer was insured for workers' compensation liability in the state of Minnesota by CNA/RSKCo, the insurer. Born on December 11, 1931, the employee was 67 years old on the date of injury, and earned a weekly wage of \$346.40.

The employee reported this injury to his supervisor, and did not mention any other injuries other than to his left foot. The employee finished his shift after his injury, and reported to the Community-University Health Care Center the next day. Barbara Gershan, R.N., referred him to the Abbott-Northwestern Hospital emergency room for further evaluation of his foot injury. He reported no other injuries to emergency room personnel other than a foot injury. On January 4, 1999, the employee was seen by Dr. Dennis Callahan, who diagnosed a contusion of the left foot with an avulsion fracture on the medial aspect of the first metatarsal of the MTP joint. On January 22, 1999, the employee was again seen by Dr. Callahan, and reported pain in his right leg which began about four days after the last visit. Dr. Callahan referred the employee to Sister Kenny Institute for physical therapy, and for a bone scan to evaluate both feet. The bone scan, taken on February 3, 1999, detected findings consistent with a left foot stress fracture. Dr. Callahan's chart note of February 8, 1999, reports the employee's history of continued significant discomfort in the right buttocks, lower back and down the right leg. Dr. Callahan stated that "I am becoming more & more convinced that the patient is having a problem with his lower back. I suspect that he has as [sic] herniated disc involving the L5 nerve root." Dr. Callahan stated that it would be best for the employee to be seen by a spine surgeon. (Er. Ex. 1.)

On February 10, 1999, the employee was seen by Dr. Richard Salib at the Institute for Low Back and Neck Care, at the referral of Dr. Callahan. Dr. Salib's chart note refers to the left foot injury as well as low back symptoms. The employee reported to Dr. Salib that while he limped on his left leg he began having problems with pain into the right buttock and down the right leg into the anterolateral calf. Dr. Salib diagnosed an acute disc herniation in the lumbar spine. At Dr. Salib's referral, the employee underwent a lumbar MRI on February 10, 1999, which indicated a small to moderately large focal right posterior disc herniation at the L1-L2 level, a broad-based central to left posterior paracentral disc herniation at L3-L4, borderline central stenosis at L4-L5, and multi-level degenerative disc and degenerative facet disease. Dr. Salib prescribed conservative treatment, including two epidural steroid injections and pain medication.

On March 25, 1999, Dr. Callahan released the employee to return to work with no restrictions regarding the left foot. His work slip stated "Pt is now being treated elsewhere for back problems - foot is OK to return to work." (Er. Ex. 1.) On the basis of Dr. Callahan's work release, the employer and insurer filed a notice of intention to discontinue temporary total disability benefits as of March 25, 1999, alleging that the employee's current disability was not causally related to his December 30, 1998 work injury, and that the employee had been released to work by Dr. Callahan.

The employee continued to treat with Dr. Salib for his low back condition. On April 7, 1999, Dr. Salib indicated that the employee's right leg and buttock symptoms were unrelated to the employee's December 30, 1998, work injury. However, Dr. Salib commented on the potential causal relationship in his April 7, 1999 chart note. He stated:

There is some disagreement as to whether or not this is a work-related injury. As I explained to the patient, the symptoms began after he had broken his toe and he was limping on the foot. There was no injury and the condition that he has is not related to trauma. It is spinal stenosis which is related to arthritic changes.

* * *

My feeling is that if the limping caused the symptoms to begin, the symptoms should have resolved when he stopped limping. It is very difficult to say that this is really a work-related problem although there is no question but that the symptoms began following his work injury and because he was limping.

(Er. Ex. 1.) In a letter dated May 10, 1999, Dr. Salib stated that he believed the employee's ongoing symptoms were related to his spinal stenosis and not to his work injury.

Following an administrative conference held on May 10, 1999, before a compensation judge, the judge issued an order on discontinuance on May 24, 1999, granting the employer and insurer's request to discontinue benefits. The employer and insurer discontinued benefits on the basis that the employee's ongoing disability was due to a non work-related low back condition. The compensation judge concluded that there was insufficient medical support for the employee's argument that he injured his low back on December 30, 1998. The employer and insurer ultimately paid temporary total disability benefits through May 10, 1999.

The employee was referred to Dr. Kirkham Wood, Orthopaedic Surgery Clinic, Fairview-University Medical Center, apparently for an opinion concerning surgery. Dr. Wood first examined the employee on June 23, 1999. The employee reported to Dr. Wood that at the time he injured his left foot on December 30, 1998, he also was knocked backwards and landed on his buttocks. Dr. Wood concluded, concerning the employee's spinal condition, that "there is not a whole lot that we see that can be necessarily tied to any on the job injury other than the patient's subjective complaint." Dr. Wood also concluded that the employee was not a surgical candidate. (Er. Ex. 1.)

On September 10, 1999, the employee was examined by Dr. Robert Wengler at the employee's request. Dr. Wengler concluded that the employee's low back and right leg pain was caused by the employee's fall or by altered gait mechanics created by the fracture of the left foot. Dr. Wengler imposed restrictions allowing light work and a ten pound lifting restriction.

On September 29, 1999, the employee filed an objection to discontinuance, claiming ongoing entitlement to temporary total disability benefits. On February 23, 2000, the employee was examined by Dr. Gary Wyard at the request of the employer and insurer. Dr. Wyard noted that the employee's February 10, 1999, MRI indicated significant degenerative changes at multiple levels. Dr. Wyard concluded that the employee had not sustained a work-related injury to his low back as a direct result of the incident nor as a consequential result of an altered gait after the incident, and that the employee had reached maximum medical improvement regarding from

his left foot injury as of February 1999. On March 7, 2000, the employer and insurer served Dr. Wyard's report on the employee as notice of maximum medical improvement.

In a letter dated June 5, 2000, Dr. Salib indicated that he was informed, for the first time, that the employee had fallen backwards and landed on his buttocks during the December 1998 incident. Based on that new information and his review of updated medical records, and also based on an aggravation caused by the employee's altered gait relative to his broken toe, Dr. Salib concluded that the employee's back condition was causally related to the employee's work injury. He concluded that the employee's symptoms were due to an aggravation of his underlying degenerative process at the L4-5 level.

Dr. Wood reexamined the employee on June 14, 2000; the employee reported continued right-sided back pain. Dr. Wood and the employee discussed the possibility of surgery, but Dr. Wood suggested additional epidural steroid injections as an alternative to surgery because "without some stronger evidence as to the efficacy of the steroids in a tight canal it is difficult to recommend a surgical decompression based on partial possibility of a surgical success." (Er. Ex. 1.) In a letter dated August 23, 2000, Dr. Wood concluded that the employee's low back condition was not related to his 1998 work injury, stating that

I personally cannot explain how a foot injury can cause degenerative spinal stenosis of such a long standing degree as Mr. Dhannu has, nor is it possible in my mind to understand how a foot injury causes necessary back pain, especially of the long standing nature of his degeneration. It is possible that the herniation at L1-2 might be related to the accident, but Mr. Dhannu's pain was not at that level and we know from studying asymptomatic population that many people can have a herniation at that level without symptomatology at all.

(Er. Ex. 1.) In a letter dated November 15, 2000, Dr. Wood concluded that the employee's complaints did not correlate anatomically with the findings on MRI scan. He stated that "[t]hus unfortunately, it still remains difficult to necessarily link the MRI finding of a disc protrusion with any of the clinical symptoms with which Mr. Dhannu presented in the early part of 1999." (Er. Ex. 1.)

A hearing was held on December 12, 2000 to address the employee's objection to discontinuance. The compensation judge found that the employee had sustained an injury to his low back on December 30, 1998, in addition to his left foot injury, and that the employee was temporarily totally disabled through June 7, 2000, as a result of his low back injury. The compensation judge also found that the employee had reached maximum medical improvement from all injuries as of February 23, 2000, relying upon Dr. Wyard's report. The employer and insurer appeal the compensation judge's finding that the employee had sustained a low back injury and that as a result of his December 30, 1998, work injury, the employee was entitled to temporary total disability from March 25, 1999, through June 7, 2000. They also argue that the compensation judge failed to address the employer and insurer's defenses of voluntary withdrawal from the labor market and failure to perform a diligent job search. On appeal, the employer and insurer also argue

that the employee's responsive brief must be stricken from consideration by this court, as it was untimely filed. The employee cross-appeals the compensation judge's finding that the employee had reached maximum medical improvement as of February 23, 2000.

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). 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, 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

Respondent's Brief

The employer and insurer's appellant's brief was filed on March 29, 2001. The employee's respondent's brief was due 25 days later on April 23, 2001. See Minn. R. 9800.0900, subp. 3. No extension was requested by the employee, and he filed his respondent's brief on April 27, 2001, four days beyond the deadline set forth in the rule. Minn. R. 9800.0900, subp. 6, states in part that "The failure of any party to timely file a brief under this part may result in the striking of that party's brief from consideration. . . ." This court has reviewed the employer's and insurer's request that the employee's respondent's brief be stricken, and has determined that the brief will be considered on appeal.

Causation

The employer and insurer claim that the employee did not immediately report any injury other than the left foot injury. They assert that Dr. Kirkham Wood's progress note of June 23, 1999, was the first medical record that includes the employee's history that he fell and landed on his buttocks on December 30, 1998. The employee claimed that not only did the barrel fall and hit his foot but also that he fell backwards and landed on his buttocks, injuring his back. Questions of medical causation fall within the province of the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1994). The compensation judge found that the employee did not initially report hurting his back because his most pressing problem was the left foot fracture, and that the employee did not develop leg pain until about a week after the incident. The compensation judge also indicated that he relied upon the reports of Drs. Wengler and Salib in reaching his conclusions.

The employer and insurer argue that Dr. Salib's opinion is without foundation since in June 2000 Dr. Salib indicated that he was just recently informed that the employee had fallen backwards and landed on his buttocks during the December 1998 incident. The compensation judge, however, specifically found that the employee had fallen during the incident, relying on the employee's testimony. "Assessment of witness credibility is the unique function of the factfinder." Tews v. Geo. A. Hormel & Co., 430 N.W.2d 178, 180, 41 W.C.D. 410, 412 (Minn. 1988). It is not the role of this court to evaluate the credibility and probative value of witness testimony and to choose different inferences from the evidence than the compensation judge. Krotzer v. Browning-Ferris/Woodlake Sanitation Serv., 459 N.W.2d 509, 513, 43 W.C.D. 254, 260-61 (Minn. 1990). A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989).

We acknowledge that there is evidence in the record to support the employer and insurer's position. Pursuant to this court's standard of review, however, the issue is not whether the evidence will support alternative findings but whether substantial evidence supports the compensation judge's findings. Where evidence conflicts or more than one inference can be drawn from the evidence, the compensation judge's findings are to be affirmed. Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 240. There is substantial evidence in the record to support the compensation judge's decision, and we affirm.

Temporary Total Disability

The compensation judge found that the employee was temporarily totally disabled through June 7, 2000, as a result of his work injury. Temporary total disability is found when the employee's physical condition, together with his training, experience, and type of work available in his community cause the employee to be unable to obtain anything but sporadic employment at an insubstantial wage. Fredenburg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 260 (Minn. 1981). It is unclear whether the judge determined that the employee was medically disabled or during what period of time he was medically unable to work. The compensation judge did not address the employer and insurer's defenses of voluntary withdrawal from the labor market and failure to perform a diligent job search. See Minn. Stat. § 176.101, subd. 1(f) and (g). The employer and insurer raised these issues in their response to the employee's objection to discontinuance, their pre-trial statement, and in the opening statement at the hearing. The employer and insurer presented evidence on these issues, and the employee admitted that he did not conduct a job search. While a job search is not always required for an employee to receive temporary total disability benefits, specific findings are necessary for this court to review these issues on appeal. It appears that the compensation judge ordered payment of temporary total disability benefits for the ninety-day period post-attainment of maximum medical improvement. If there is evidence that the employee could not return to his job, but he was capable of working within restrictions, there may be some obligation on the part of the employee to look for work. Therefore, we vacate the compensation judge's award of temporary total disability benefits and remand for specific findings based on the record.

Maximum Medical Improvement

The employee appeals the compensation judge's finding that the employee had reached maximum medical improvement. Maximum medical improvement is defined 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." Minn. Stat. § 176.011, subd. 25. Maximum medical improvement "occurs upon medical proof that the employee's condition has stabilized and will likely show little further improvement." Polski v. Consolidated Freightways, Inc., 39 W.C.D. 740, 742 (W.C.C.A. 1987). Whether MMI has been reached is a question of ultimate fact for the compensation judge to decide. Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 528-29, 41 W.C.D. 634, 639 (Minn. 1989).

The employee argues that the compensation judge erred by relying upon Dr. Wyard's opinion to determine that the employee had reached maximum medical improvement since Dr. Wyard determined that the employee had not injured his back on December 30, 1998, but had a pre-existing low back condition. However, Dr. Wyard also stated in his report that the employee did not need any medical care or treatment relating to his low back. A factfinder generally "'may accept all or only a part of any witness' testimony.'" Proffit v. Minnesota Harvest Apple Orchard, 48 W.C.D. 215, 219-20 (W.C.C.A. 1992) (quoting City of Minnetonka v. Carlson, 298 N.W.2d 763, 767 (Minn. 1980)), summarily aff'd (Minn. Mar. 3, 1993). The compensation judge reviewed the medical evidence, and concluded that the employee did not seem to be having any significant treatment at the time that he saw Dr. Wyard, that his condition had leveled off, and that he was not considered to be a surgical candidate. Substantial evidence supports the compensation judge's finding that the employee has reached maximum medical improvement, and therefore we affirm.