

LAWRENCE JOHNSON, Employee/Appellant, v. USX CORP., SELF-INSURED, Employer.

WORKERS' COMPENSATION COURT OF APPEALS  
SEPTEMBER 25, 2001

No. [REDACTED SSN]

HEADNOTES

SUITABLE JOB - SUBSTANTIAL EVIDENCE. Substantial evidence supported the compensation judge's findings that the was unable to perform sedentary work offered by the employer on August 8 and September 13, 2000, but was able to perform sedentary work offered by the employer on November 30, 2000.

Affirmed.

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

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's finding that, after November 30, 2000, the employee could perform a light-duty job offered by the employer. We affirm.

BACKGROUND

The employee, Lawrence Johnson, is a resident of Mountain Iron, Minnesota. He was born on February 27, 1949. After graduation from high school in 1967 he studied welding and received a welding certification at the Eveleth Vocational Technical School. He went to work for the employer, USX Corporation, in 1972 as a laborer, and subsequently worked for the employer as a millwright. (3/25/98 F&O: Finding 2.)

The employee sustained multiple injuries to his low back while working for the employer, including injuries on August 16, 1985, April 18, 1988, September 10, 1988, December 29, 1988, May 7, 1991, January 31, 1993 and December 31, 1993. The employee also sustained injury to his cervical spine on December 31, 1993. The employee underwent an anterior cervical discectomy, decompression and fusion at C5-6 on May 10, 1994. An MRI scan of the employee's lumbar spine on August 31, 1994 showed disc bulging at all five lumbar levels with ventral effacement of the dural sac but no nerve root involvement or nerve root compression. (3/25/98 F&O: Findings 3, 17, 18, 20, 21.)

A functional capacities evaluation on September 15 and 16, 1994 resulted in the imposition of restrictions including that the employee not work in a forward bent sitting position

or stand more than 2/3 of a working day. He was found to be able to lift 60 pounds from floor to waist and 30 pounds from the waist to overhead. The employee returned to work for the employer on December 19, 1994. (3/25/98 F&O: Findings 22, 23).

Following his return to work, the employee reported to his treating neurosurgeon, Dr. R. E. Freeman, that he had been experiencing constant low back discomfort with radiation into the hips and buttocks as well as some numbness of the left lower extremity in the thigh and calf to the heel, bottom of the foot, and first and second toes. Dr. Freeman diagnosed multiple level lumbar degenerative joint disease with myofascial pain. The employee was treated with a TENS unit and, in March 1997, with facet blocks. (3/25/98 F&O: Findings 24, 26.)

On February 10, 1999, an MRI scan showed that the disc protrusion at L2-3 was effacing the left L3 nerve root. (2/16/01 F&O: Finding 2 [unappealed].)

On June 27, 2000 the employee experienced acute pain in his low back. He tried to work but was unable to remain on the job. He was immediately seen by his family physician, Dr. D. P. Mersch, M.D., who noted that the employee was scheduled to see Dr. Freeman the next day, and removed him from work. (Exh. B.) To Dr. Freeman the employee complained of low back and groin pain which spread to his testicles and down his legs, and that his legs tended to go numb from hip to knee. He told the doctor that he had been off work because of his injury at least four times since last seen by Dr. Freeman on October 20, 1997. Examination showed the employee's motor, sensory and reflex responses of the lower extremities to be within normal limits. The employee exhibited normal gait and posture and could toe & heel walk with ease. Dr. Freeman's impression was of low back pain with sciatica. He recommended that the employee see a urologist, then undergo discography at L2-3, L3-4, L4-5 and L5-S1 to help diagnose the source of his discomfort. (Exh. C.)

Dr. Freeman's findings and recommendations were conveyed to Dr. Mersch who next saw the employee in late June. Dr. Mersch continued the employee off work pending completion of Dr. Freeman's evaluations. On July 12, 2000 the employee again saw Dr. Mersch who noted that discography had been scheduled and that there was the possibility of surgery. He continued the employee off work. (Exh. B.)

On July 14, 2000 Dr. Lifson, M.D., the employer's company physician, recorded that he had called Dr. Freeman regarding the possibility of modified duty work for the employee. Dr. Lifson's notes state that Dr. Freeman concurred with an assessment that a secondary factor in the employee's condition was reactive depression. He further recorded that modified duty, as he had described it, was approved by Dr. Freeman. (Exh. 3.)

The discography was performed on July 28, 2000 by Dr. Stephen Endres, M.D. According to Dr. Endres, the employee reported the most concordant pain associated with injection at L2-3. (Exh. D.)

The employer extended a job offer to the employee on August 8, 2000 for a temporary light duty assignment, in its heavy equipment shop, performing sedentary office work including paperwork preparing safe job procedures, filing, and other duties. The physical

requirements permitted the employee to sit, stand, walk, bend and twist as tolerated. The job required no squatting, climbing or heavy lifting. The offer claimed that this work was consistent with a return to work as authorized by Dr. Freeman. The employee did not accept this offer. (Exh. 4; T. 51-53.)

On September 13, 2000 the employer extended a second job offer, for a temporary light duty assignment in its central shops area with the employee's duties to consist of verifying the location of fire extinguishers by noting information on a form held on a clipboard. This job permitted the employee to sit, stand, walk, bend and twist as tolerated and required no squatting, climbing or heavy lifting. The job offer stated that the employee could take breaks as needed. Any objects to be carried would not exceed two pounds. The employee did not respond to this offer. (Exh. 4; T. 35, 56.)

The employee returned to Dr. Mersch on September 20, 2000. He reported ongoing problems with pain in his back with radiation into groin. Dr. Mersch noted that the employee could not walk with normal posture, had severe pain in his groin, and was almost doubled over with discomfort. The doctor noted that he had received a form from U.S. Steel regarding a light duty assignment, but opined that "[the employee's] situation today is such that he would not be able to perform the activities as described and in fact is not able to do any activities and therefore I cannot support his return to work at this time." (Exh. B.)

On September 25, 2000 the employee was again seen by Dr. Freeman for his ongoing complaints of back discomfort. Dr. Freeman noted that the employee had not yet been able to obtain authorization through the workers' compensation system for the consultation he had recommended for the employee to consider the possibility of undergoing an IDET procedure. The employee asked Dr. Freeman about the employer's assertion, made in the August 8, 2000 job offer, that he had authorized the employee to return to work. Dr. Freeman's office records indicate that he denied having made any such authorization. (Exh. C.)

On October 11, 2000 the employee was seen by Dr. Mersch who noted that the employee was "still in limbo" since his last visit as the consultation requested by Dr. Freeman for the employee to see Dr. Etter about an IDET procedure was "tied up in a legal process." The employee reported that he was experiencing a lot of pain and spasms in the left side and not getting relief with his current medication. (Exh. B.) According to the employee's testimony, his muscle spasms resolved two or three weeks after September 2000, but without resolution of his pain. (T. 34, 45.)

The employee was again seen by Dr. Mersch on October 25, 2000. He was having radicular pain along the left flank and into the testicular area. Dr. Mersch opined this was due to radicular pain from spinal compression of the cutaneous nerve. He noted that the employee had not yet been able to obtain the IDET consultation recommended by Dr. Freeman, and that the employee in the meantime was "unable to return to work because he has not had a full evaluations [sic] . . . at the very best I suppose he could get back to some exclusively sedentary type of work but there is nothing available for him." The employee was noted to be depressed by this situation and Dr. Mersch prescribed antidepressant medication. (Exh. B.)

The employee underwent an examination by Dr. Thomas Litman, M.D., on behalf of the employer on November 6, 2000. Dr. Litman diagnosed longstanding degenerative changes in the lumbar spine complicated by a disc bulge at L2-3 impinging on the left L3 nerve root. With respect to the employee's ability to work, he opined that "[i]t is difficult to place objective restrictions as restrictions are due solely to subjective complaints." He suggested that the employee should be restricted from walking more than one-half hour at a time and should walk no more than two hours during any workday, that he should sit for no more than one hour at a time and no more than four hours in any workday, and that he should avoid essentially all lifting. In his opinion, however, "from the strictly orthopedic point of view, I would allow Mr. Johnson to work at either of the sedentary positions you supplied to me as a work description on an 8 hour per day/5 day per week basis and would not place any specific restrictions on [his] work activities." He opined that the employee had reached maximum medical improvement for his neck condition but not for his low back condition, which would require ongoing treatment. He opined that IDET might be reasonable but that in his view an open disc resection would provide more relief. (Exh. 1.)

The employer again offered both of the previous light duty jobs on November 30, 2000, and requested that the employee select one of them. The employee did not respond to the offers. (Exh. 4; T. 58.)

The employee was seen again by Dr. Mersch on December 1, 2000. Dr. Mersch commented on the adverse examination findings by Dr. Litman, noting that Dr. Litman had suggested open surgery for disc disease and had "also placed him on rather severe restrictions. I think that this is within reason. Certainly he can't go back to his job and he obviously has a problem." The employee's condition was noted to remain about the same, with radicular pain, especially in the left leg, being fairly severe. (Exh. B.)

On January 31, 2001 a hearing was held before a compensation judge of the Office of Administrative Hearings. The issues presented were whether the employee was entitled to temporary total disability compensation from and after September 17, 2000 and whether the employee had refused light duty employment within his restrictions. Following the hearing, the compensation judge found that the employee had not unreasonably refused the job offers of August 8, 2000 and September 13, 2000, but that the employee failed to prove an inability to perform the jobs offered from and after November 30, 2000 and that his refusal of that job was not reasonable. Benefits were awarded from September 18, 2000 to November 30, 2000 and denied thereafter through the date of hearing. The employee appeals the denial of benefits for the latter period.

## 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

The employee appeals from the judge's finding that the employee failed to prove a physical inability to perform the job offered from and after November 30, 2000, and the consequent denial of temporary total disability compensation from that date through the date of hearing.

Specifically, the employee argues that, as the same jobs were offered on November 30, 2000 as had been previously offered in August and September 2000, it was inconsistent for the compensation judge to find that the employee could not perform these jobs when first offered but could do so after the date of the second offer. The employee argues that the evidence does not support a finding that his condition had significantly improved between the dates of the first offers and the last offer, such that he became able to perform the offered jobs. Specifically, the employee argues that the judge based his determination in large part on an allegedly mistaken conclusion that the resolution of the employee's spasm symptoms in October 2000 represented a significant improvement in the employee's medical condition which made it possible for him to return to light-duty sedentary work.

We note, however, that nothing in the judge's findings or memorandum indicates that the compensation judge's decision was primarily based on the resolution of spasm. The judge's memorandum states only that

The entirety of the evidence indicates that the employee had acute pain problems in his low back from June 27, 2000 through mid to late October 2000. On October 25, 2000, the employee's physician, Dr. Mersch, also was of the opinion the employee could perform sedentary work. Dr. Litman's subsequent examination on November 6, 2000, confirms that the employee then had the physical ability to perform the light duty jobs offered by the employer. Accordingly temporary total disability benefits have been allowed from September 18, 2000, until November 30, 2000, but thereafter to the date of hearing have been denied.

(Mem. at 6.)

It appears that the compensation judge awarded temporary total disability for the initial period because the medical evidence pertaining to that period supported the conclusion that the employee was unable to work. For the later period, the judge accepted the opinion of

Dr. Litman. Dr. Litman's opinion was rendered with respect to the condition of the employee at the time that the physician saw him, and did not indicate whether he could have worked prior to that time. It was not inconsistent for the judge to fail to apply that opinion retrospectively. Accordingly, the judge could have reasoned that the weight of the evidence regarding the earlier of the two periods favored the employee's position, while the weight of the evidence for the later period favored the finding that the employee was able to work in the offered jobs, at least as of the date of Dr. Litman's examination. The question is not one of whether there is an inconsistency in the judge's reasoning, so much as whether the judge reasonably accepted Dr. Litman's opinion over any divergent medical opinion respecting the latter period. The judge also noted that Dr. Mersch, as of October 25, had expressed at least some acceptance of the possibility that the employee could work in a sedentary job at that time<sup>1</sup>. This issue is one of fact resting primarily on the compensation judge's choice between the opinions of the medical experts, a basis for decision which we must affirm unless the opinion relied upon was without adequate foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Dr. Litman's opinion had adequate foundation. We therefore affirm.

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<sup>1</sup> The employee argues that the compensation judge misinterpreted Dr. Mersch's October 25, 2000 comments, but we think that the judge's interpretation was not clearly erroneous. The employee's argument for a different interpretation rests on inference, and the judge's contrary inferences about the significance of the doctor's language were not unreasonable.