DAVID LaMONT, Employee, v. HORMEL FOODS CORP., SELF-INSURED/COMP. COST, Employer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 2, 2001

No. [REDACTED SSN]

HEADNOTES

DISCONTINUANCE - MISREPRESENTATION. Substantial evidence, including lay testimony and medical records, supported the compensation judge's determination that the employee did not misrepresent his condition contrary to the abilities shown on videotape surveillance, and further supported the determination that work was not shown to be available which the employee could have done consistent with the activity level shown on the surveillance videotapes during the period at issue.

Affirmed.

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

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's denial of their requested discontinuance of temporary total disability benefits as of August 23, 1999, and from the judge's underlying findings that the employee did not misrepresent his condition to his treating physician, that the employee was temporarily totally disabled and incapable of performing a modified job with the employer on or about June 30, 1999, and that there was no work available within the employee's restrictions on July 30, 1999 from the employer. We affirm.

BACKGROUND

The employee, David Lamont, sustained an admitted work-related injury to the thoracic spine on or about August 15, 1996, while working for the employer, Hormel Foods, as a maintenance mechanic at a weekly wage of $1,091.44. (Findings 1, 3 [unappealed]).

Following the injury, the employee initially worked for the employer in various light-duty jobs sorting cans of Spam, pulling lids off cans, and working in the shipping department. He underwent surgery on April 13, 1998 in the form of a anterior discectomy and fusion at T9-10. Following the first fusion surgery, the employee returned to work for the employer in about September 1998 in a job maintaining and repairing equipment used for fresh pork sausage production starting at two hours per day and increasing to four hours per day. However, the employee had a return of his symptoms and a CT scan showed that the fusion had failed. The

employee's treating physician, Dr. James Ogilvie, M.D., removed the employee from work on October 21, 1998. On December 22, 1998, Dr. Ogilvie authorized the employee to work part-time without repetitive lifting, bending or twisting under a ten-pound lifting limit. The employer had no work available within these restrictions at that time. The employee underwent a second fusion procedure on February 8, 1999. (T. 43-44, 154-155, Exhs. A, D; Stipulation 1; Findings 3, 7, 8 [unappealed].)

The employee was seen by Dr. Ogilvie on March 31, 1999 in follow up. He reported an increase in pain which the doctor noted was centered about the old incision and radiated in the left axilla along the employee's T6 rib. Dr. Ogilvie recommended additional healing time with the employee to return for reevaluation in two months. The employee was not released to return to work. The employee returned to Dr. Ogilvie for reevaluation on June 2, 1999. The employee reported pain in his left thoracic area with bending, lifting or twisting. Dr. Ogilvie recommended a CT scan to determine whether pseudoarthrosis was present, and stated that if no pseudoarthrosis were found, consideration could be given to a return to light sedentary work with no lifting greater than ten pounds and no repetitive bending, lifting or twisting. The CT scan was performed the same day, and was read as showing lucency surrounding the fusion cage which reflects the possibility of a pseudoarthrosis. (Exh. A.)

On June 29, 1999 surveillance was commenced to view the employee's activities at the request of the self-insured employer. The employee was observed on that date to go to a gun club and fire about six rounds in target shooting that morning, using some kind of table support for the gun. Later in the afternoon, between 1:38 p.m. and 2:21 p.m., he participated with his wife in washing their pickup truck, which involved some bending, squatting and reaching, as well as climbing into the cab of the truck. The next morning the employee was observed to go to the gun club two separate times and the investigator heard the firing of about six rounds on the first occasion and about ten on the second. That afternoon, between 12:43 p.m. and 2:03 p.m., the employee and his wife and daughter were observed carrying cushions, bedding, blankets, pillows and a board from a camper trailer. The investigators reported that the employee apparently vacuumed inside the trailer, although this was not directly observed. Again the activities involved some bending, walking and climbing. (T. 67-88.)

On July 21, 1999 the employee returned to a scheduled medical appointment with Dr. Ogilvie. His qualified rehabilitation consultant ("QRC"), Thomas S. Saby, also attended the appointment. The doctor's notes for that date state:

> CLINIC VISIT: Mr. Lamont is status post interbody fusion and posterior fusion at T9-10. Although this was clearly identified as a pain focus in preoperative discography, he still has disabling midback symptoms.
>
> RADIOGRAPHIC EVALUATION: An x-ray marker today over the center of his pain revealed it to be approximately the T6 vertebral body. The CT scan shows the fusion at T9-10 to be healing well and although the T9 pedicle screws are outside the pedicle there has been no harm, I would think this is healing well.

> PLAN: After discussion with his QRC, his wife and the patient he has requested that additional diagnostic tests be performed in order to try to identify pain focus. The plan is to do T4-5, T5-6 and T6-7 discography and I will contact him after I have read those discography reports. In the meantime he is not able to be engaged in gainful employment.

(Exh. A: 7/21/99.)

The self-insured employer had requested that further surveillance be carried on regarding the employee's physical abilities. On July 22, 1999 the employee was videotaped underneath his truck changing his engine oil, and later using a lawn mower to mow his front lawn for about 36 minutes. (T. 88-90; Finding 12 [unappealed].)

After reviewing the results of the surveillance, the employee's personnel manager, Timothy Fritz, came to the conclusion that the employee could be working. He did not make a job offer to the employee, however, but telephoned the employee and asked that he come in to the employer's offices. When the employee arrived, Mr. Fritz confronted him with photographs taken during the surveillance and testified that he "asked [the employee] to explain himself, to explain why it would appear to me from the photos, you know, he could certainly be working, that he wasn't totally disabled. Mr. LaMont's response was that he didn't feel like he'd done anything wrong, that he hadn't violated his restrictions." Mr. Fritz responded that "you don't have any restrictions, you're supposedly totally disabled." Mr. Fritz concluded that the employee had committed misrepresentation and "abuse of the disability plans," constituting a dischargeable offense under the employer's labor contract. He informed the employee that he would be discharged. (T. 21-26.)

On July 30, 1999 the employer filed a notice of intention to discontinue temporary total disability benefits ("NOID"), alleging that the employee "misrepresented his ability to work to his doctor on 7/21/99" and that the "employee has the ability to return to work." The employer filed an "addendum" to its NOID on August 10, 1999, adding as an additional ground for discontinuance that the employee was not entitled to further temporary total disability benefits under Minn. Stat. § 176.101, subd. 1(e), as a result of termination for cause, and attaching a copy of an involuntary discharge form terminating the employee for gross misconduct effective August 6, 1999. (Judgment Roll.)

An administrative conference on the issue before a compensation judge of the settlement division of the Office of Administrative Hearings resulted in an order, served and filed on August 25, 1999, denying the proposed discontinuance. The employer filed a petition to discontinue compensation benefits on October 11, 1999, requesting formal hearing. (Judgment Roll.)

The employee underwent a medical examination on November 3, 1999 by Dr. Mark Friedland on behalf of the self-insured employer. Dr. Friedland opined that the employee was capable of working full-time with restrictions on lifting more than 20 pounds, with no repetitive

bending, twisting or stooping, and with an ability to change positions intermittently between sitting, standing and walking. Based on his review of the medical records and the surveillance videotapes, Dr. Friedland offered the opinion that the employee had been capable of work within these restrictions since June 2, 1999. (Exh. 1.)

The employee returned to Dr. Ogilvie in scheduled follow up on November 10, 1999. As of that date, Dr. Ogilvie ruled out further surgical treatment. Dr. Ogilvie released the employee for work on a part-time, sedentary basis with restrictions including a ten pound lifting limit, no bending or twisting, and occasional kneeling, squatting, sitting, standing, overhead lifting and climbing. (Exh. A.)

The employee subsequently engaged in a self-directed job search and had been working as a clerk in a convenience store from January 31, 2000 through the date of hearing below. (T. 106.)

A hearing was held before a compensation judge of the Office of Administrative Hearings on March 15, 2000. Following the hearing, the judge found that the employee had not misrepresented his condition to Dr. Ogilvie, that the employee was not capable of performing a modified job with the employer on or about July 30, 1999, and that, in any event, there was no modified work available to the employee at that date. The judge denied the request to discontinue benefits as of August 23, 1999. The self-insured employer appeals.

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 issue before this court is whether there is substantial evidence in the record to support the compensation judge's determination that there was no work available to the employee which was within the appropriate restrictions resulting from his work injury. Included in the evidence reviewed by the compensation judge was the testimony of the employee, the employee's wife, and the employee's QRC, the medical records and reports, the surveillance videotapes and related testimony. We believe there was adequate support in the record to support the

compensation judge's findings that the employee's physician's restrictions were appropriate and there was no work available at the employer.

The compensation judge was not clearly erroneous in concluding the surveillance videotapes only showed the employee engaged in moderate levels of activity, including reaching, twisting, bending and lifting. Only about one to one and one-half hours of such activity in total was observed in any single day, and that on only two of four days of surveillance, with no such activity sustained beyond about 35 to 45 minutes without the employee taking a break. None of the weights of objects the employee is shown to lift would appear to exceed ten pounds. The truck washing performed by the employee was done over about a one-half hour period, assisted by his wife, and the employee's wife testified that the employee had complained that his back was "killing him" while they were washing the truck. (T. 134-135; findings 10, 11 [unappealed].) The employee's activities in changing the oil in his truck were performed during a period of a little over an hour, including a 35-minute break about halfway through this task. The lawn mowing activity shown on the videotapes consisted of pushing a modest-sized power mower around a small, level lawn with no high or deep grass for about 35 minutes. These were the only significant physical activities observed during surveillance which lasted about 12 hours per day for four days, and during which the employee was also observed sitting or resting without any physical activity for similar periods of an hour or so at a time. (Exhs. 5-A, 5-B, 6; T. 76-78, 83-85, 87-93.).

The employee testified that his target shooting was performed with the gun resting on a "bipod," with the back of the gun on a sandbag, and with the employee seated at a shooting bench, merely sighting the gun and pulling the trigger to fire rounds at about three to four minute intervals. (T. 55-56, 62, 70, 82.)

The employer primarily claims that the employee misled his physician on the basis of the statement in Dr. Ogilvie's chart note of July 21, 1999 that the employee "still has disabling midback symptoms." The employer claims the employee in some manner represented to the doctor that he had a level of symptoms which was inconsistent with the activities he was observed to perform. The compensation judge heard testimony about the employee's discussion with his doctor on that date from the employee, his wife, and his QRC, all of whom attended the medical appointment. They testified that the employee told the doctor that he still had back pain, and that the doctor's focus was on determining specifically where along the back the pain was located. There was no discussion regarding the employee's physical abilities in light of these symptoms, or on the nature or extent of his capability to perform activities of daily living. None of the witnesses could recall the employee having ever described his symptoms to the doctor as "disabling," and it was not unreasonable for the compensation judge to conclude that the term "disabling" in the medical record represented only the doctor's professional assessment of the effect of the symptoms based on his examination and knowledge of the employee's medical history, rather than an assertion by the employee that he was disabled from engaging in physical activities at the level observed during the surveillance. (T. 49, 102-103, 138-139, 162.)

As the evidence reasonably sustains a finding that the doctor did not inquire as to the employee's activities at home, the evidence supports an inference by the compensation judge that the doctor's decision to keep the employee off work pending the results of further tests was a medical decision based solely on the doctor's own appraisal of the employee's examination,

reported symptoms and medical history, and that the question of employee's ability to perform limited tasks of short duration in home activities did not play a role in that medical decision.

The compensation judge was entitled to rely on the treating physician's off work restriction as indicative of the employee's ability to work and temporary total disability status between July 21, 1999 and November 10, 1999, and was not required to adopt the views of the employer's medical expert, Dr. Friedland. This court must affirm a compensation judge's choice between divergent expert medical opinions where the opinion adopted has sufficient foundation. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

In light of the judge's reasonable factual findings and resolution of the competing inferences, it was appropriate for the judge to conclude that the employee had not falsely and knowingly misrepresented the then-present facts, and that, in issuing the restrictions keeping the employee off work, the doctor did not rely on any representation, whether by false statement or by omission, regarding the employee's ability to perform activities similar to those observed in the surveillance.

The employer also appeals from the compensation judge's finding that the employer had not offered the employee work which the employee could perform consistent with the level of physical ability indicated by the activities he was seen to engage in at home. The employer's personnel manager agreed that the employer, despite its disagreement with Dr. Ogilvie's failure to set specific restrictions and release the employee for light-duty work on July 21, 1999, did not then have the employee evaluated by another physician to set work restrictions, despite taking the position that no modified job could be offered in the absence of specific medical restrictions. The employer further conceded that it was very unlikely that work could be offered by the employer which would be consistent with the limited durations of activity and frequency of breaks exhibited by the employee in the surveillance videotapes. In light of the absence of evidence that there was work available to the employee consistent with the level of ability he exhibited on the videotapes, the compensation judge did not err in concluding that the employer had not demonstrated sufficient grounds for the discontinuance of temporary total disability benefits during the period in question. (T. 25-38.)