ALLEN L. MCKISSIC, Employee, vs. BOR-SON CONSTR. and AM. RISK FUNDING INS./CRAWFORD & CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 26, 2001

No. [REDACTED SSN]

HEADNOTES

EVIDENCE. Where the employer and insurer was allowed to impeach the employee with inconsistent statements from his deposition, the compensation judge did not err by refusing to admit the entire deposition into the record. Also, the compensation judge did not err by refusing to admit documents regarding the employee's criminal history where the employee was questioned regarding this history.

TEMPORARY TOTAL DISABILITY. Substantial evidence supports the compensation judge's finding that the employee's emotional condition was a substantial contributing factor to his lack of employment since August 3, 2000.

Affirmed.

Determined by: Rykken, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Jennifer Patterson

OPINION

MIRIAM P. RYKKEN, Judge

The employer and insurer appeal the compensation judge's refusal to admit evidence of the employee's past criminal behavior and the employee's discovery deposition at the hearing, and also appeal the compensation judge's findings that the employee's mental health condition was causally related to the employee's work injury, that the employee was totally disabled, and that the employee required medical management of his emotional condition before job placement could recommence. We affirm.

BACKGROUND

On July 9, 1999, Allen McKissic, the employee, sustained admitted severe multiple injuries when he fell from a scaffolding while working as a brick tender for Bor-Son Construction, the employer, which was insured for workers' compensation liability by American Risk Funding Insurance, the insurer. As he was standing on an aluminum plank on a scaffold, the plank broke and the employee fell approximately 42 feet, breaking his right wrist, his left leg and left foot. The employee was hospitalized for more than a month and was diagnosed with cauda equina syndrome, L4 burst fracture treated with L3-5 transpedicular fixation and fusion, left ankle fracture treated with open reduction and internal fixation, right colles fracture, and neurogenic bowel/bladder and

sexual dysfunction. At the time of his injury, the employee was 34 years old and was working full-time at an hourly wage of $22.00.

While the employee was hospitalized, he was evaluated for symptoms of anxiety, low frustration for pain and inconvenience, high anxiety due to anticipation of pain, and erectile dysfunction. The employee underwent two psychological evaluations, and was recommended for treatment of adjustment disorder and anxiety disorder. The employee declined treatment, however. After the employee was released from the hospital, he could not care for himself and had to return home to his parents who helped him with his activities of daily living including bathing, dressing, putting on and removing a back brace, and toileting. The employee's daily living activities continued to be severely restricted by his ongoing orthopedic and neurologic injuries. As found by the compensation judge:

> Physical residuals of his July 1999 work injury include, but are not limited to, the following: loss of grip strength in the right hand; a left ankle that does not flex and a left foot that does not roll so that he has to swing his left leg around in order to walk and use a cane for balance; loss of range of motion of the lumbar spine due the fusion; ongoing neurogenic bowel/bladder and sexual dysfunction; and right arm, left leg and low back pain. No doctor whose records or reports are in evidence has expressed the opinion that the employee's pain complaints are out of proportion to the trauma to multiple body parts he sustained on July 9, 1999. The employee has been in pain every day since July 9, 1999.

According to the employee's records, he had nightmares, flashbacks of the accident, crying spells, fatigue, loss of energy, problems concentrating or making decisions, and withdrew from family and friends.

In October 1999, the employee began working with QRC John Busse regarding medical management. The employee was released to return to work from his physical injuries in April 2000. Rehabilitation services then turned to job placement, and the employee began working with job placement vendor Alicia Lahti. The employee began a job search and attended interviews. In July 2000, the employee told Ms. Lahti that he felt overwhelmed and stressed and he stopped his job search. Also in the summer of 2000, the employee attempted to escape his symptoms with the use of alcohol and drugs. On August 22, 2000, the employee sought counseling at the Crisis Intervention Center at the Hennepin County Medical Center. At the hearing, the QRC testified that he would not recommend that the employee recommence job placement services until he has been released to do so by a psychiatrist.

On October 5, 2000, the employee underwent a psychiatric evaluation with Dr. Thomas Gratzer at the employer and insurer's request. Dr. Gratzer diagnosed anti-social personality disorder which preexisted the employee's work injury and was not affected by that injury or the subsequent chronic pain. Dr. Gratzer determined that the employee had no major mental disorder which affected the employee's ability to conduct a job search or work, and that

the employee was at maximum medical improvement, and did not recommend any further treatment. In his report, Dr. Gratzer stated that

> There is no pharmacological treatment for antisocial personality disorder nor does Mr. McKissic present with acute anxiety or depressive symptoms that could be treated with pharmacological agents. Mr. McKissic's prognosis with treatment is guarded.
>
> * * *
>
> Individuals with antisocial personality disorder are not disabled with respect to vocational functioning. Antisocial personality disorder reflects characterological issues and is not a major mental disorder. Psychiatric disability is associated with major mental disorders causing significant disturbances in thought, mood, or anxiety that render the individual unable to work. Mr. McKissic does not relate symptoms of a major mental disorder nor did I diagnose him with a major mental disorder.

(Er. Ex. 7.)

On October 6, 2000, at the request of the employer and insurer, the employee attended a vocational evaluation conducted by David Berdahl. Mr. Berdahl outlined his preliminary findings in a report dated October 23, 2000, concluding that in view of the employee's minimal work history and his physical work restrictions, the employee was "in need of entry level employment," consistent with his restrictions. Mr. Berdahl concluded that the employee "would also benefit significantly from the assistance of his professional rehabilitation providers, in terms of finding suitable employment." (Er. Ex. 6.)

On October 16, 2000, the employee was evaluated by Dr. Fay Benbrook at the Hennepin County Medical Health Center. Dr. Benbrook diagnosed chronic posttraumatic stress disorder and "mood disorder due to chronic pain and dysfunction secondary to injury, with depressive features" and prescribed antidepressant medication, individual psychotherapy, and psychological testing. Dr. Benbrook did not address whether the employee was able to conduct a job search or work.

On July 31, 2000, the employer and insurer filed two notices of intention to discontinue benefits on grounds of expiration of the 90-day period following attainment of maximum medical improvement (MMI)[1] and lack of cooperation with medical treatment plan and rehabilitation plan. Following an administrative conference held on August 24, 2000, an order allowing discontinuance was filed August 28, 2000. The judge's basis for discontinuance was that the employee had reached MMI from all physical injuries and presented no evidence supporting

[1] Pursuant to Minn. Stat. § 176.101, subd. 1(j).

payment of wage loss benefits due to a psychiatric claim. The employee objected, alleging an ongoing need for psychiatric care.

A hearing was held on November 2, 2000. At the time of the hearing, the parties stipulated that the employee had reached maximum medical improvement plus 90 days for all of his orthopedic and neurologic injuries. The issues at hearing were whether the employee sustained a consequential emotional injury as a result of his physical injury, whether the employee had reached maximum medical improvement from his emotional condition, and whether the employee required medical management before job placement could recommence. During the hearing, the compensation judge refused to admit evidence of the employee's criminal history other than an assault conviction for which he was incarcerated for approximately 28 months between 1986 and 1989. The compensation judge also refused to admit the employee's deposition testimony into evidence, although she allowed the employer and insurer's attorney to impeach the employee's testimony with inconsistent statements from his deposition.

In Findings and Order served and filed November 28, 2000, the compensation judge found that the employee has sustained consequential emotional injuries of anxiety and depression arising out of his July 9, 1999, work injury, that he has not reached maximum medical improvement with respect to his consequential emotional injury, and that medical management of his emotional condition is necessary before job placement efforts are recommenced. The employer and insurer appeal.

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. 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

Evidentiary Rulings

The compensation judge disallowed admission of the employee's criminal records into evidence. The issue before this court is whether the compensation judge erred by refusing to admit evidence regarding the employee's alleged criminal history, a legal question that this court may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. at 608 (W.C.C.A. 1993).

By way of background, one of the witnesses called by the employer and insurer to testify at hearing was a private investigator who conducted a criminal background check of the employee. That witness obtained records from three law enforcement agencies, along with district court records, which the employer and insurer offered into evidence at the hearing. The employer and insurer attempted to offer these records into evidence as impeachment testimony, and also as foundational information on which the employer and insurer's psychiatric expert relied in formulating his diagnosis of the employee's psychiatric condition. The compensation judge ruled that the criminal records were inadmissible as evidence, as they either reported on a felony conviction that was over ten years old or referred solely to non-felony arrests and charges that were ultimately dismissed. (T. 59-61.)

Although in workers' compensation hearings "the compensation judge is bound neither by the common law or statutory rules of evidence nor by technical or formal rules of pleading or procedure," Minn. Stat. § 176.411, subd. 1; Minn. R. 1415.2900, subp 6, the compensation judge cited Minn. R. Evid. 609, which states in part:

> (b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by the specific facts and circumstances substantially outweighs its prejudicial effect. . .

Minn. R. Evid. 609.

The employer and insurer argue that the compensation judge erred by refusing to admit the employee's criminal records into evidence. They argue that the compensation judge should have allowed evidence of the employee's criminal history, including driving violations, arrests which did not lead to convictions, felony convictions more than ten years old, and misdemeanor convictions, as foundation for Dr. Gratzer's opinion that the employee has an anti-social behavior personality disorder. The compensation judge disallowed the evidence, using Minn. R. Evid. 609 as a guide. At hearing, she also advised counsel for the employer and insurer that she believed he was offering the criminal records "for not only the anger but also the credibility because part of [his clients'] position is that he's malingering." (T. 61.) She then explained that she had an opportunity to assess the employee's testimony concerning previous arguments, fights, and arrests, as much of the employee's criminal history background was addressed at the hearing through the employee's cross-examination. Evidentiary rulings are generally within the sound discretion of the compensation judge. Ziehl v. Vreeman Constr. Co., slip op., (W.C.C.A. Oct. 15, 1991). Based upon the age of the criminal records, and the compensation judge's opportunity to review the employee's testimony at hearing, it was reasonable for the compensation to disallow admission of the criminal records. The compensation judge did not abuse her discretion by refusing to admit records of the employee's criminal history, and we therefore affirm that evidentiary ruling.

The compensation judge also disallowed admission of the employee's deposition transcript into evidence. During cross-examination of the employee, and before offering the transcript into evidence, counsel for the employer and insurer referred to portions of the employee's deposition testimony in order to impeach the employee. The employer and insurer then offered the transcript into evidence specifically for impeachment purposes, arguing that there were multiple inconsistencies between the employee's deposition testimony and his hearing testimony. (T. 71.) The employee objected to that exhibit, agreeing that the deposition could be used for impeachment purposes, but that it should not be allowed into evidence since the employee was present to testify at hearing.

The compensation judge did not allow the transcript to be admitted into evidence, explaining that since counsel for the employer and insurer had already impeached the employee during cross-examination, thereby advising the judge of the inconsistent testimony, the deposition transcript would constitute cumulative evidence. As evidentiary rulings are generally within the sound discretion of the compensation judge, Ziehl, and since the employer and insurer were able to utilize the deposition testimony for impeachment (which was their express purpose for offering the deposition into evidence), it was reasonable for the compensation to disallow admission of the deposition transcript into evidence. As the compensation judge did not abuse her discretion, we therefore also affirm that evidentiary ruling.

Temporary Total Disability

The employer and insurer appeal from the compensation judge's award of temporary total disability since August 3, 2000. At the hearing, the compensation judge found that the employee's emotional condition was a substantial contributing factor to his lack of employment between August 3, 2000, and the date of hearing, November 2, 2000, and ordered payment of ongoing temporary total disability benefits since August 3, 2000. (Order No. 1). The compensation relied on the medical opinion of Dr. Benbrook, and specifically determined that

> ...restrictions from the employee's physical injury continued to be a substantial contributing factor limiting his prospects for return to work. In addition, he was also experiencing the effects of consequential emotional injuries and had yet to receive the course of counseling recommended by Dr. Benbrook. As of the date of hearing, job goals appropriate of the employee's work search had to be evaluated in terms of not only his physical restrictions, but also his emotional condition. Dr. Benbrook's Global Assessment of Functioning (GAF) rating of 50 put the employee in the serious or moderate levels of difficulty in impairment within the meaning of the definition set out at page 32 of DSM IV. This opinion of Dr. Benbrook supports the conclusion that further clarification of the employee's emotional condition and need for treatment should occur before job placement is recommenced.

(Finding No. 17.)

The issue before this court is whether the compensation judge's conclusion is supported by substantial evidence and is not clearly erroneous. The employer and insurer argue that there is not substantial evidence in the record to support the compensation judge's findings that the employee's emotional condition was a substantial contributing cause of the employee's lack of employment from August 3, 2000, through the date of the hearing and that the employee requires medical management and counseling before job placement may recommence. The employer and insurer argue that the QRC and job vendor did not suggest that the employee should discontinue his job search, and that their vocational expert, David Berdahl, concluded that the employee could conduct a job search.

While Dr. Gratzer concluded that the employee did not have a mental disorder which affected his ability to search for work, Dr. Benbrook diagnosed chronic posttraumatic stress disorder and prescribed antidepressant medication, individual psychotherapy, and psychological testing. The employee's QRC, John Busse, testified that the employee should not resume job placement services until he was released by a psychiatrist.

Pursuant to this court's standard of review, 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. In addition, we note that it is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). The compensation judge reviewed the employee's medical records and concluded that the employee's permanent physical restrictions and ongoing problems, including chronic pain and having to walk by swinging his left leg around due to fusion of bones and loss of motion in joints, and his bowel and bladder difficulties, all continue to affect his ability to interact with other people. Relying on Dr. Benbrook's opinion, she also concluded that until the employee's emotional condition was treated, the employee's rehabilitation plan should consist of medical management of the employee's emotional condition and not immediate job placement. There is substantial evidence in the record to support the compensation judge's finding that the employee's emotional condition was a substantial contributing factor to his lack of employment since August 3, 2000, and we affirm.