

GARY R. MEYER, Employee/Appellant, v. GEORGE F. COOK CONSTR. CO. and STATE FUND MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 14, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - NOID. Where the compensation judge limited the issue to whether the employee had attained MMI after a 1995 injury, the discontinuance was vacated and the matter remanded to determine if the employee had attained MMI in 2000 after an exacerbation of the original injury made the employee unable to continue working.

Vacated and remanded.

Determined by Wheeler, C.J., Wilson, J. and Pederson, J.
Compensation Judge: Bernard Dinner

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from a discontinuance of temporary total disability compensation based on attainment of maximum medical improvement.

BACKGROUND

The employee, Gary Meyer, first injured his knees during military service as a paratrooper in the Vietnam War. In 1970, he underwent bilateral open partial meniscectomies on the lateral aspect of both knees. On November 30, 1995, the employee was working for the employer, George F. Cook Construction Company as a cement finisher when he fell while carrying a trolling machine and sustained an admitted right knee injury. On February 7, 1996, the employee underwent arthroscopic surgery to the right knee performed by Dr. Jack Bert, M.D. The employee had a tear of the meniscus, which was excised. He returned to work in his pre-injury job about two months after the surgery. The employer and insurer paid temporary total disability compensation for various periods through May 5, 1996, when benefits were discontinued on the basis of the employee's return to work. (Exhs. 1, 4; Judgment Roll: 5/1/96 NOID.)

The employee did not experience the degree of pain relief he had anticipated from this surgery, and on July 10, 1996 he saw Dr. Jack A. Drogt, M.D., for a second opinion on behalf of the insurer. Dr. Drogt concluded that the employee's work injury had exacerbated pre-existing degenerative joint disease and resulted in a tear of the lateral meniscus that had required excision. He opined that the employee had reached maximum medical improvement from the effects of the 1995 work injury. In his view, the employee would likely require additional surgery in the future,

but in his opinion such surgery would be solely as a result of the employee's preexisting knee condition and not due to the effects of the 1995 work injury. On August 12, 1996 Dr. Bert completed a report in which he also indicated that the employee had reached maximum medical improvement from the effects of the 1995 work injury. (Exhs. 1, 2.)

The parties agree that the employee continued to work as a cement finisher for various companies and did not undergo further medical treatment to the right knee until January 22, 1999, when he returned to Dr. Bert and was diagnosed with "traumatic pre-patellar bursitis" which was aspirated and injected with steroids. The employee was restricted from kneeling for one month and told to return in about a month. The employer and insurer reinstated payment of temporary total disability compensation effective beginning January 22, 1999. (Exh. 4.)

The employee initially did well with an April 6, 1999 chart note indicating that the pre-patellar bursitis had resolved "beautifully." The employee returned to work at full wages on April 9, 1999 and the employer and insurer discontinued payment of temporary total disability benefits. (Exh. 4; Judgment Roll: 4/14/99 NOID.)

However, on December 14, 1999 the employee returned to Dr. Bert who diagnosed pre-patellar bursitis with a "massive" effusion. The employee was again taken off work, and the employer and insurer again initiated payment of temporary total disability compensation. On May 16, 2000 the employee underwent a right pre-patellar bursectomy. On May 18, 2000 the employer and insurer served a Notice of Intent to Discontinue ("NOID"), stating that temporary total disability benefits would be discontinued on the basis that the employee had reached maximum medical improvement ("MMI") from his 1996 work injury and the report evidencing MMI had been served on him on August 15, 1996. The NOID further alleged that all benefits paid since May 1, 1996 were paid under a mistake of fact. (Exh. 4; Judgment Roll: 5/18/2000 NOID.)

The employee objected to the proposed discontinuance and on June 22, 2000 an administrative conference was held before Compensation Judge James F. Cannon at the Office of Administrative Hearings. An administrative order was served and filed on June 29, 2000 denying the proposed discontinuance. In his memorandum, the judge gave several reasons for denial of the discontinuance. First, the judge noted that the employer and insurer had failed to attach copies of the medical reports on which they relied to the NOID, as required by statute. Further, he noted that the medical reports relied on to demonstrate maximum medical improvement were more than four years old and predated the employee's recent surgery. The judge reasoned, among other things,

that temporary total disability benefits were resumed from December 14, 1999 to May 18, 2000, and that the employee's recent knee surgery was initially deemed to be compensable by the insurer. Thus, if the insurer now wishes to claim that the employee's current knee condition is not causally related to the work injury of November 30, 1995, the insurer must obtain an updated medical report from the employee's treating physician, or an IME physician,

clearly indicating that the employee's current knee condition is not causally related to the work injury of November 30, 1995.

(Judgment Roll: 6/29/00 Order at 3 [unnumbered].)

The employer and insurer did not file a petition to discontinue objecting to this order, but scheduled the employee for medical examination with their examiner, Dr. Peter Daly, M.D., who saw the employee on September 28, 2000. Dr. Daly diagnosed degenerative arthritis which he opined was related to the employee's armed services injuries and not to the work injury of November 30, 1995. He also diagnosed pre-patellar bursitis but inactive without accumulated fluid or external inflammation. He opined that the employee did not currently need treatment for either the degenerative arthritis or the pre-patellar bursitis, but that the employee would likely need treatment for his degenerative arthritis in the form of a total knee arthroplasty though not in the near future. He did not consider either the pre-patellar bursitis or the degenerative arthritis to result from a Gillette injury culminating in December 1999. He rated the employee with a two percent permanent partial disability related to the 1995 work injury. In his opinion, the employee was not temporarily totally disabled from employment and could work on a full-time basis with restrictions of avoiding prolonged standing greater than four to five hours in an eight-hour shift and with no repetitive squatting or kneeling. He stated that the employee had reached maximum medical improvement from his November 30, 1995 work injury on August 10, 1996. (Exh. 4).

The employer and insurer served the report of Dr. Daly on the employee on October 11, 2000. (T.19-20.) On January 31, 2001 the employer and insurer filed a notice of intent to discontinue temporary total disability compensation, effective January 29, 2001, solely on the basis that more than 90 days had elapsed since service of notice of maximum medical improvement. (Judgment Roll.)

An administrative conference on the proposed discontinuance was held on March 9, 2001 before a compensation judge of the settlement division of the Office of Administrative Hearings. On March 16, 2001 the judge served and filed an order permitting discontinuance. The employee filed an objection to discontinuance on March 21, 2001, resulting in a formal hearing before a compensation judge on June 13, 2001. (Judgment Roll.) The employee appeals from the compensation judge's findings and order allowing discontinuance.

STANDARD OF REVIEW

Question of law. The issues on appeal in this matter involve the interpretation and application of statutes and case law to undisputed facts. While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, Minn Stat. § 176.421, subd. 1(3) (1992), a decision which rests upon the application of the law to undisputed facts involves a question of law which this court may consider *de novo*.

DECISION

The compensation judge found that the employee had reached maximum medical improvement from the 1995 work injury on August 10, 1996, based on the September 28, 2000 medical report of Dr. Daly, and that this report was served on the employee on October 11, 2000. (Finding 8.) Based solely on this finding, the compensation judge determined that the employer and insurer had “proven by a preponderance of the evidence that it is reasonable to discontinue employee’s temporary total disability benefits as of January 29, 2001 based on the fact that the employee had reached maximum medical improvement; and over 90 days has elapsed from and after the service of maximum medical improvement.” (Finding 9.)

The employee does not dispute the finding of an initial attainment of maximum medical improvement on August 10, 1996 nor does the employee dispute service of Dr. Daly’s report. Instead, the employee argues that the attainment of maximum medical improvement in 1996 is, under the specific facts and circumstances of this case, legally insufficient to support the discontinuance of temporary total disability compensation. Specifically, the employee argues that his claim of entitlement to temporary total disability compensation was predicated on the theory that he became medically unable to continue working due to his 1995 injury when Dr. Bert took him off work on December 14, 1999, entitling him to the recommencement of temporary total disability compensation, and that this new period of temporary total disability initiated the need for a new period of maximum medical improvement. Accordingly, the employee argues, the initial maximum medical improvement in 1996 is wholly irrelevant to discontinuance for the period in question in this case.

The employee made this argument at the hearing below, but the employer and insurer disputed that the issue of whether the employee had become medically unable to continue working in 1999 as a result of the 1995 work injury was properly before the compensation judge. The compensation judge did not reach the issue of whether maximum medical improvement had been reached from an alleged medical inability to continue working, stating in his memorandum that:

The insurer has not agreed to expand the issue as to “medically unable to continue work” as claimed by employee pursuant to Minn. Stat. § 176.101, subd. 3j(a). As this is an expedited hearing pursuant to Minn. Stat. 1995 §176.101, subd. 3e; and as insurer has objected to the expansion of the issues, the Compensation Judge has addressed only the issue of MMI as presented by the NOID.

(Mem. at 3.)

The Workers’ Compensation Act sets forth specific requirements regarding the commencement and discontinuance of temporary total disability compensation. Minn. Stat. § 176.221, subd. 1, provides that either payment must commence or written notice must be given of a denial of liability within 14 days following notice or knowledge by the employer “of a new period of temporary total disability which is caused by an old injury compensable under this chapter” Commencement of such payment “does not waive any rights to any defense the employer has

on any claim or incident either with respect to the compensability of the claim under this chapter or the amount of the compensation due.” During the first 30 days following the employer’s knowledge or notice of the injury, the employer and insurer may terminate payment on the basis of a denial of primary liability by filing a notice of denial of liability; however, “[a]fter the 30-day period, payment may be terminated only by the filing of a notice as provided under section 176.239.”

In the present case, the employee first returned to work in 1996 and wage loss benefits were discontinued at that time based on the return to work. Subsequently the employee was able to work and did continue to work for a variety of employers through December 1999. At that time, the employee was again taken off work by Dr. Bert and the employer and insurer reinitiated payment of temporary total disability. No denial of liability was filed within the first 30 days of this resumption of temporary total disability benefits, necessitating that the employer and insurer follow the NOID procedures set forth in Minn. Stat. §176.239 in order to discontinue payment. The employer and insurer complied with this requirement and filed their NOID on January 31, 2001.

In their arguments below and before this court, the employer and insurer take the position that any consideration of whether maximum medical improvement has been reached for a second time, subsequent to the employee’s 1999 disability from work or his consequent May 2000 surgery, constitutes an improper expansion of the issues by introducing the issue of whether the employee became medically unable to continue working in 1999 due to the effects of the 1995 work injury.¹

As noted by the compensation judge and argued by the employer and insurer, Minn. Stat. §176.238, subd. 6(d), limits the issues to be considered at a hearing initiated by the NOID procedures to those expressly raised in the notice or petition to discontinue. We agree that the question of causation for the employee’s inability to continue was outside the scope of the issues presented by the NOID in this case. However, we do not agree with the compensation judge that, as a result, the question of whether the employee had attained MMI from such an alleged inability to continue was outside the scope of the issue presented in the NOID or that the attainment of MMI in 1996 constituted sufficient grounds for discontinuance in this case.

The critical factor in this case is the recommencement of temporary total disability compensation by the employer and insurer in 1999. Because the employee had long since returned to work and reached MMI following the 1995 injury, he no longer would have been entitled to recommencement of temporary total disability payments in the absence of a new period of maximum medical improvement. Pursuant to Minn. Stat. §176.101, subd. 1(e)2,

if temporary total disability compensation ceased because the employee returned to work or ceased under paragraph (h) [release

¹ The employer and insurer noted to this court in oral argument that while they do not necessarily contest that the employee was unable to continue working in December 1999, they dispute that this disability was causally related to the 1995 work injury. The parties agreed that this issue was not properly before either the compensation judge or this court.

to work without restrictions caused by the work injury] or (j) [90 days have elapsed since attainment of maximum medical improvement], it may be recommenced if the employee is medically unable to continue at a job due to the injury. Where the employee is medically unable to continue working due to the injury, temporary total disability compensation may continue until any of the cessation events in paragraphs (e) to (l) occurs following commencement. For purposes of commencement or recommencement under this clause only, a new period of maximum medical improvement under paragraph (j) begins when the employee becomes medically unable to continue working due to the injury. Temporary total disability compensation may not be recommenced under this clause and a new period of maximum medical improvement does not begin if the employee is not actively employed when the employee becomes medically unable to work. All periods of initial and recommenced temporary total disability compensation are included in the 104-week limitation specified in paragraph (k).

As there is no dispute that the employee initially reached maximum medical improvement from the 1995 injury by some time in 1996, the recommencement of benefits in 1999 was not a continuation of his initial claim for benefits through 90 days after the first attainment of MMI from the 1995 injury itself. Discontinuance should therefore be predicated on grounds relevant to the current period of disability and of alleged entitlement to benefits, and not on grounds relevant instead to the initial period of disability.

Minn. Stat. §176.238, subd. 6, provides that the hearing on an NOID “shall be limited to the issues raised by the notice or petition unless all parties agree to expanding the issues.” It was on this basis that the compensation judge ruled below that the employee’s claim that he was “medically unable to continue working” was outside the scope of the issues presented. We note, however, that the totality of the facts and circumstances of a case, tempered with the application of common sense, sometimes require that the scope of the issues raised by the NOID be viewed with a degree of latitude. For example, in Violette v. Midwest Printing Co., 415 N.W.2d 318, 40 W.C.D. 445 (Minn. 1987), our supreme court held that an employee’s entitlement to temporary partial benefits was within the scope of the issues raised by a NOID seeking discontinuance of temporary total compensation based on the employee’s return to post-injury work, as the provisions of the Workers’ Compensation Act governing these benefits worked in tandem and could not be viewed separately. Similarly, in Kulenkamp v. Timesavers, Inc., 420 N.W.2d 891, 40 W.C.D. 860 (Minn. 1988), the supreme court held that consideration of primary liability might also be appropriate in the context of a discontinuance hearing, so long as the parties had reasonable notice of the issue. As we stated in Reid v. Ryder Truck Rental, 42 W.C.D. 677 (W.C.C.A. 1989), where the rationale for an NOID intertwines with other entitlement issues, “[a] compensation judge is not required to make decisions in a vacuum or attempt to deal with interrelated issues in isolation.” 42 W.C.D. at 681 (emphasis in original).

Under the unique facts and circumstances of this case we conclude that the compensation judge’s finding of an attainment of maximum medical improvement in 1996 is

legally insufficient to support the proposed discontinuance of benefits. The employer and insurer had notice of the fact that employee's claim of entitlement to temporary total disability compensation was predicated on the basis of an inability to continue and on qualification for a second period of maximum medical improvement. This issue was so closely intertwined with the basis for the NOID that a discontinuance could not be granted on the basis of attainment of MMI without its consideration. Under the unique facts and circumstances of this case, the finding of MMI in 1996 is not a sufficient basis for granting discontinuance.

We, therefore, vacate and remand to the compensation judge for reconsideration. At the hearing before this court the employer and insurer alleged that, in any event, the report and correspondence of Dr. Daly provides adequate evidence of his opinion that the employee was again at maximum medical improvement following the May 2000 surgery to support a discontinuance. If the evidence so warrants, the judge may determine that the employee has reached MMI from the recent period of "inability to continue working" without reaching the issue of whether the inability to continue working is causally related to the 1995 injury. If the judge determines that the evidence fails to support a finding that MMI has been reached from the alleged period of inability to continue, the judge should consider whether the employee's inability to continue working was as a result of the 1995 work injury. On remand, the parties may submit additional evidence on the MMI causation issues. If the judge determines that the parties are unprepared to proceed on the causation issue, the judge may grant such continuances as may be appropriate.