KELLY RENEE NEUMANN, Employee/Petitioner, v. AT&T, SELF-INSURED, adm'd by GATES MCDONALD, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 15, 2001

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - OMITTED RECORD. Where the employee's attorney had inadvertently failed to include a doctor's report in the exhibit admitted into the record, we grant the employee's petition to supplement the record, vacate in part, and remand for reconsideration.

TEMPORARY BENEFITS - DISCONTINUANCE. Where the compensation judge found that the employee had reached maximum medical improvement and made findings regarding the discontinuance of temporary total disability benefits and temporary partial disability benefits even though temporary total disability benefits were not at issue, we remand for reconsideration of the issue of discontinuance of temporary partial disability benefits since reaching maximum medical improvement does not impact entitlement to temporary partial disability benefits.

Motion to supplement the record granted, vacated in part and remanded.

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

OPINION

BACKGROUND

On October 6, 1998, Kelly Renee Neumann, the employee, was employed by AT&T, the employer, as a customer sales and service representative. On that date, the employer was self-insured for workers' compensation liability with Gates McDonald serving as the self-insured employer's insurance administrator.

On October 6, 1998, the employee was standing at her work station, reaching overhead for a book on an upper shelf, when several large manuals fell on her. The employee fell back, hitting first her chair and then the floor, sustaining an injury to her lumbar spine. The employer admitted liability for this injury, and paid the employee temporary total disability benefits from November 7, 1998 to April 3, 2000, and also paid temporary partial disability benefits from April 3, 2000 until August 11, 2000. Born in 1968, the employee was 30 years old at the time of her injury.

Medical Background

The employee has a history of pre-existing multi-level back problems. On May 12, 1992, she injured her neck, mid back and low back as a result of a motor vehicle accident. She received chiropractic treatment following this accident and was diagnosed with chronic cervical strain syndrome. On September 27, 1994, the employee injured her low back in a second motor vehicle accident. Between that accident and her October 6, 1998 injury, the employee underwent various conservative treatments, including steroid injections and physical therapy. The employee received chiropractic treatment in the summer of 1996, at which time she complained of headaches, stiff neck, tingling and pain in the upper arm by her shoulder blade, intermittent low back pain, right leg discomfort, right buttock and thigh pain. On July 13, 1996, the employee noted pain in her right leg radiating to her knee and constant low back pain. In August or September 1996, the employee's low back symptoms worsened after she bent over to pick up her son. Following this 1996 incident she was unable to walk for three days due to increased low back pain.

The employee first consulted Dr. Glenn Buttermann on March 3, 1997, concerning her low back and right leg pain, and consulted him periodically through at least April 12, 1999. According to Dr. Buttermann's report of March 3, 1997, the employee provided a history of low back pain following a 1994 automobile accident and an exacerbation in 1996 after lifting her son. In September 1997, the employee underwent three epidural steroid injections at the L5-S1 level, which provided little relief. On April 13, 1998, the employee reported continued severe low back pain and right thigh pain. Dr. Buttermann discussed fusion surgery with the employee, and recommended that she undergo a discogram to determine the need for surgery. The employee apparently declined to undergo a discogram and surgery at that point. Dr. Buttermann also prescribed additional epidural injections; the employee underwent injections in April 1998 and reported some pain relief. On April 22, 1998, the employee underwent a lumbar MRI, which showed L4-5 and L5-S1 degenerative changes with annular degenerative changes.

The employee consulted Dr. Thomas A. Bergman of Neurosurgical Associates on June 3, 1998, for evaluation of her lumbar spine. The employee reported to Dr. Bergman that she had noted low back and leg pain since a motor vehicle accident four years earlier, and that she noted buckling of her right leg and numbness and throbbing in her low back and legs. Dr. Bergman recommended that the employee undergo a discogram to determine whether she was a candidate for lumbar fusion surgery; as of the date of hearing, she has not yet undergone a discogram. The employee again consulted Dr. Buttermann on September 14, 1998. She underwent additional epidural injections on September 17 and 23, and October 1, 1998 at the L5-S1 level.

The employee testified that prior to her October 6, 1998 injury, she occasionally missed work due to her low back problems; the record reflects that the employee missed time from work due to "sickness disability" for portions of 12 of the 26 weeks preceding her October 6, 1998 injury. The employee testified that she had taken occasional days of leave from work under the Family Medical Leave Act (FMLA) due to her low back pain; those periods primarily correlated with recovery time from epidural steroid injections. The employee also restricted her recreational activities due to her low back injury.

On October 6, 1998, following her work-related injury, the employee was taken by ambulance to the emergency room at North Memorial Medical Center. She reported recurrent radicular pain in her right leg and an inability to walk. Emergency room personnel prescribed medication and advised her to rest until she could consult Dr. Buttermann the next day. On October 7, 1998, the employee reported to Dr. Buttermann that, although she had noted some improvement from the epidural injections, she felt increased pain following her October 6, 1998, injury. He referred the employee for an MRI scan, additional steroid injections and physical therapy. The employee underwent an MRI scan on October 9, 1998. Results of that scan were compared to the MRI conducted on April 22, 1998; the interpreting radiologist noted that "the findings at L4-5 are unchanged. The findings at L5-S1 are slightly more prominent in the right paracentral to lateral location." At Dr. Buttermann's referral, the employee underwent an additional epidural steroid injection at the L5-S1 level.

At follow-up appointments in November 1998, January 1999 and February 1999, Dr. Buttermann recommended discography, additional epidural steroid injections, continued physical therapy, and surgical intervention. Dr. Buttermann last examined the employee on April 12, 1999, and referred her to a physiatrist and also recommended a functional capacities evaluation.

In May of 1999, Ms. Neuman began treating with Dr. Paul Biewen, a physical medicine specialist. Dr. Biewen noted that Ms. Neumann reported a marked increase in her pain following a fall at work in October 1998. Upon his initial examination of Ms. Neumann, he noted that she reported pain in the right low back, across the hip into the anterior thigh without symptoms below knee level. She reported the pain to be quite severe. The employee had been restricted from work as a result of her October 6, 1998 injury. Dr. Biewen released Ms. Neumann to return to work on September 20, 1999 on a light duty work schedule with work restrictions. According to rehabilitation reports in the record, Ms. Neumann's QRC, Connie Graham, worked closely with various AT&T personnel prior to September 20, 1999 to arrange for ergonomic changes to Ms. Neumann's workstation to accommodate her work restrictions.

However, on September 20, 1999, the employer notified the QRC that it would not accommodate Ms. Neumann's disability and light duty return to work. Thereafter, the employer notified the employee by letter that her 52 weeks of short-term disability benefits had expired, that the Health Affairs organization[1] had advised it that she would not be returning to work, and that she would be taken off the active payroll effective October 12, 1999. The employer also advised the employee that she may be eligible for long-term disability benefits.[2] On April 3, 2000, the employee began working for another employer as a part-time retail sales consultant, earning $8.50 per hour plus 3% sales commission, as compared to her pre-injury full-time wage of approximately $18.05 per hour.

[1] The record does not identify the "Health Affairs Organization" although by context it appears that this entity is part of the self-insured employer's organization.

[2] Based on information in the record, the employer had been paying workers' compensation benefits to the employee, and was not paying short-term disability benefits at the time of this letter.

At the request of the self-insured employer, the employee was examined by Dr. Robert Barnett, Jr., on February 7, 2000. Dr. Barnett determined that the employee had sustained a temporary exacerbation of her lumbar disc degenerative condition as a result of her October 6, 1998, injury, that she had returned to her pre-injury status and that she had reached maximum medical improvement (MMI) from that injury. Dr. Barnett also concluded that although he would assign a permanency rating of 10% permanent partial disability of the whole body, he attributed that entirely to the employee's preexisting condition. Dr. Barnett recommended physical work restrictions, but also concluded that none of those restrictions were related to her October 6, 1998, injury. On February 23, 2000, the employer served Dr. Barnett's report on the employee, along with notice of MMI.

Dr. Paul Biewen again examined the employee on March 8, 2000, and released her to full-time work within physical work restrictions. In his report of March 17, 2000, Dr. Biewen also determined that the employee had reached MMI from her October 6, 1998, injury. Dr. Biewen concluded that there was a slight change on the MRI taken after the employee's work-related injury, and that the employee had sustained 10 percent permanent partial disability of the body as a whole.[3] Dr. Biewen apportioned liability for the employee's permanency as 75 percent due to her pre-existing condition and 25 percent due to her injury on October 6, 1998. In a report dated March 24, 2000, Dr. Biewen concluded that the employee was more restricted following her October 6, 1998 incident than she had been prior to that injury.

PROCEDURAL BACKGROUND

This matter has a complicated procedural history. On March 6, 2000, the self-insured employer filed a Notice of Intention to Discontinue Benefits (NOID) advising that temporary total disability benefits would be discontinued as of March 2, 2000, based upon the February 7, 2000 report issued by Dr. Robert Barnett. An administrative hearing was held on April 11, 2000; by that time, the employee had returned to work at a wage loss, and was being paid temporary partial disability benefits. Following that hearing, Compensation Judge John E. Jansen served and filed an Order on Discontinuance on April 17, 2000 by the Office of Administrative Hearings - St. Paul Settlement Division, in which he denied the discontinuance of benefits. The compensation judge ordered reinstatement of temporary total or temporary partial disability benefits, due to the employee's ongoing disability and physical work restrictions. Pursuant to that order, the employer paid temporary total disability benefits until April 3, 2000. They also paid temporary partial disability benefits from April 3, 2000, when the employee returned to work, until July 12, 2000, the date of hearing.

On May 4, 2000, the employer filed a Petition to Discontinue Benefits, confirming in its petition that it was paying ongoing temporary partial disability benefits. On July 12, 2000, a hearing was held before a compensation judge. On August 11, 2000, Compensation Judge Joan Hallock issued a Findings and Order, in which she allowed discontinuance of temporary total disability or temporary partial disability benefits 90 days after the February 23, 2000 service of notice of maximum medical improvement. On or about August 24, 2000, following the issuance of that Findings and Order, the employee filed a motion with the Office of Administrative

[3] Pursuant to Minn. R. 5223.0390, subp. 4.C.(2).

Hearings, requesting that the compensation judge supplement the record with a written report of Dr. Glenn Buttermann, dated March 29, 2000. The employee's attorney alleged that he inadvertently omitted this report from documents offered into evidence at the hearing. The employee also requested that after consideration of that report, the compensation judge either amend the Findings and Order or grant a rehearing. On August 30, 2000, the compensation judge denied the employee's motion, citing to Minn. R. 1415.3100, stating that the court had no jurisdiction to "amend the order, set aside the order, or order a rehearing."[4] The compensation judge suggested that the employee instead file an appeal with the Workers' Compensation Court of Appeals.

By way of background, the employee's attorney argues that although Dr. Buttermann's report is dated March 29, 2000, he did not receive the report until April 28, 2000, well after the administrative conference of April 11, 2000. He provided a copy of this report to counsel for the employer on May 5, 2000. At the hearing on July 12, 2000, the employee's attorney introduced into evidence Employee's (Respondent) Exhibit 1, which he asserted was identical to the packet of exhibits attached to Employee's Response to the NOID, with one exception: one additional document had been included, Dr. Buttermann's report dated March 29, 2000, which was not available at the time of the April 11, 2000 administrative conference. The employee's attorney claims that prior to the hearing, and in discussions held off the record, he advised the compensation judge and counsel of the contents of Exhibit 1. The employee's attorney argues that counsel for the self-insured employer did not object to admission of the offered medical reports, including Dr. Buttermann's. The employee's attorney also argues that employer's counsel assumed, as did the employee's counsel, that Dr. Buttermann's report was contained in employee's Exhibit 1. (T. 6-7, 68.) However, the employer's attorney disagrees with that characterization of events and assumptions, and argues that he did not assume that this particular medical report was included in the employee's hearing exhibits.[5]

On September 8, 2000, the employee filed a Notice of Appeal from the Findings and Order. On November 2, 2000, the employee filed, with the Workers' Compensation Court of

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[4] Minn. R. 1415.3100 states:

> When a compensation judge has issued the findings, conclusions, and decision, the judge's jurisdiction over the case ends, except for taxation of disbursements or awarding of attorney's fees, unless the case is referred to the compensation judge by the court of appeals and the chief administrative law judge for supplemental findings, taking of additional testimony, rehearing, or other action. Compensation judges may correct clerical or mathematical errors in decisions any time before appeal.

[5] The hearing record does not include Dr. Buttermann's report of March 29, 2000. The employee's attorney asserted in his affidavit that his own copy of the hearing exhibits contained the March 29, 2000 report of Dr. Buttermann. After receiving the Findings and Order, he confirmed with the Office of Administrative Hearings and the employer's attorney that neither of their hearing exhibits contained this medical report.

Appeals, a Notice of Motion and Motion to Supplement the Record with the Report of Dr. Glenn Buttermann and Amend the Findings and Order Following Due Consideration of the Report, or in the Alternative, to Set Aside the Order Discontinuing Benefits and Grant a New Hearing, and to Expand the Record on Appeal. The employer filed a motion to strike the affidavit of employee's counsel; that motion was denied by order of this court served and filed November 4, 2000. This court therefore addresses the employee's appeal from the Findings and Order of August 11, 2000, as well as the employee's motion to supplement the record and alternative motion to set aside the Findings and Order.

STANDARD OF REVIEW

In reviewing cases 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, "[factfindings 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). 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." Id.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Employee's Motion to Supplement the Record

The employee has filed alternative motions with the Workers' Compensation Court of Appeals to either supplement the record with Dr. Buttermann's March 29, 2000, report and amend the August 11, 2000 Findings and Order, or to set aside the Findings and Order and to grant a new hearing along with expansion of the hearing record. The employee's attorney originally had filed a motion with the Office of Administrative Hearings, requesting that the compensation judge supplement the record with Dr. Glenn Buttermann's report and therefore either amend the Findings and Order or grant a rehearing.[6] By order dated August 30, 2000, the compensation judge denied

[6] The record does not contain a copy of this motion. In her pleadings, the employee asserts that she filed such a motion after receipt of the August 11, 2000, Findings and Order. The employer has not disputed that such a motion was filed.

that motion on the grounds that she lacked jurisdiction to amend the Findings and Order pursuant to Minn. R. 1415.3100.[7] The employee appealed.

The employee argues that Dr. Buttermann's report of March 29, 2000, was inadvertently omitted from the medical records offered into evidence at the hearing and therefore argues that the findings and order should be vacated, that the record should be re-opened to allow inclusion of Dr. Buttermann's March 29, 2000, report into evidence, and that the findings and order then should be amended based on this additional medical report. The employee argues that this court should follow the rules applicable to Minnesota courts which allow for the admission of inadvertently omitted evidence, particularly where the exclusion of the omitted evidence was not harmless error and affects the substantial rights of the proponents of the evidence.[8]

As set forth in the Office of Administrative Hearings Litigation Procedures, Minn. R. 1415 et seq., a compensation judge "is not bound by the common law, statutory rules of evidence, or technical or formal rules of pleading or procedure." Minn. R. 1415.2900, subp. 6. Although it may be appropriate to utilize the rules of civil procedure as guidelines in certain circumstances, we do not apply those here. However, this court has discretion to remand a matter for further proceedings. Bergeson v. U.S. Fidelity and Guar. Co., 414 N.W.2d 724, 729, 40 W.C.D. 409, 419 (Minn. 1987); Minn. Stat. § 176.421, subd. 6(5) (the workers' compensation court of appeals "may remand or make other appropriate order"). This court generally does not allow a litigant to reopen or retry a case by presenting additional evidence which he or she failed to present at the original hearing. In the interests of fairness, however, many factors in this matter require that the omitted medical report be added to the hearing record and that the matter be remanded to the compensation judge for further review. See, Doble v. Jesco, Inc., 514 N.W.2d 572, 573, 50 W.C.D. 276, 277 (Minn. 1994) ("where the evidence is neither conclusive nor satisfactory, a remand may be appropriate").

The employee's attorney plausibly argues that it was an inadvertent error on his part that the medical report was not included in the trial exhibits. The record contains support for that argument. There are repeated references in the transcript to this particular report; those references indicate that the employee's attorney was relying on the report in presentation of the employee's case. The report was generated prior to the July 12, 2000, hearing; presumably, the employee's attorney anticipated offering that report into evidence at the hearing. In addition, the

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[7] The record does not contain the compensation judge's denial of the employee's motion to supplement the record. The employee's attorney asserts that such a denial was issued by the Office of Administrative Hearings on August 30, 2000; the employer does not dispute that assertion.

[8] Rule 60.02(a) of the Minnesota Rules of Civil Procedure allows a party to obtain relief from an order for the following reasons, among others:

> (a) Mistake, inadvertence, surprise, or excusable neglect;
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> * * *
>
> (f) Any other reason justifying relief from the operation of the judgment.

employer's medical expert, Dr. Barnett testified that prior to his deposition, he had the opportunity to review some additional medical records, comprised of the follow-up reports that were generated by Drs. Biewen and Buttermann after Dr. Barnett's examination, plus some previous chiropractic records from Dr. Behm and records from the Noran Neurological Clinic. (Er. Ex. A., Depo., Dr. Barnett, p. 6.)[9] It is apparent from the record that the employee's attorney assumed that this particular report indeed was included in the exhibit he offered into evidence.

The employee also argues that Dr. Buttermann's March 29, 2000 report is not cumulative and has critical evidentiary value because Dr. Buttermann was the employee's treating orthopedic surgeon from March 1997 through at least April 1999. The employee also argues that admission and consideration of the report would not be prejudicial to the employer since the employer's counsel was served with the report in May 2000 and the employer's medical expert had reviewed the report prior to his testimony, and since the employer has had ample opportunity to depose or cross-examine Dr. Buttermann on its content. The employee also argues that the employer did not object to its admissibility, but instead stipulated to its admission and relied upon the opinions of Dr. Buttermann, as contained in his report, at the hearing.

The employer's attorney argues that he understood that the employee's Exhibit 1 was identical to the exhibit presented at the administrative conference and therefore did not contain Dr. Buttermann's March 29, 2000, report. The list of exhibits, recorded by the compensation judge at the hearing, lists employee's Exhibit No. 1 as "Response to NOID (w/attachments)"; there is no itemization of the attachments, and therefore no specific reference to Dr. Buttermann's March 29, 2000 report in the exhibit list.

The employer asserts that it did not stipulate to admission of the March 29, 2000 report. Our review of the hearing transcript confirms that counsel for the employer did not stipulate to the admission of this medical report, but instead generally stated that he did not object to "any of the medical records."[10] There is no documentation in the hearing record that the employer stipulated to the admission of Dr. Buttermann's March 29, 2000 report.

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[9] The record contains only one report issued by Dr. Buttermann after Dr. Barnett's examination on February 7, 2000, and that is the Buttermann report dated March 29, 2000.

[10] At the hearing, following the employee's attorney's offer of exhibits into evidence, the compensation judge inquired whether the employer objected to any exhibits. Counsel for the employer responded as follows:

> MR. PLAGENS: I do, your Honor. I think to summarize–and I certainly can address specific ones if Court and counsel wish. On the employees' exhibits, we have no objection to any of the medical records contained therein. They are intermixed in A and also in some of the other (indiscernible). We have no objection, as I said, to any of the medical records. In fact, the employer would rely on the reports of Dr. Buttermann and Dr. Bergman as part of their case in chief.

The employer also argues that the report is cumulative as it contains information in Dr. Buttermann's chart notes, and offers no new medical diagnosis. We disagree; the report is not cumulative. Although it does contain information found in Dr. Buttermann's chart notes, it is his first report in which he specifically states his opinion concerning apportionment of liability and his opinion that the employee's October 6, 1998, work injury permanently aggravated her pre-existing condition. In his March 29, 2000, report, Dr. Buttermann concluded that the employee had sustained a "permanent and significant aggravation to her pre-existing conditions" as a result of her October 6, 1998 injury based on the change in her condition following that injury, the MRI findings and her need for work restrictions following that injury. Dr. Buttermann also assigned a 10 percent permanent partial disability rating and apportioned liability for the employee's resulting disability at a 75/25 percent level, as previously determined by Dr. Biewen.

Under the unique circumstances of this case, we vacate Findings Nos. 6, 8, 18 and 20, and Orders Nos. 1 and 2, and remand to the compensation judge for reopening of the record to include Dr. Buttermann's March 29, 2000 medical report, and for reconsideration of the employer's Petition to Discontinue in view of the entire record, including Dr. Buttermann's March 29, 2000 report. The compensation judge should limit her review to the existing record and that additional medical report.

Temporary Benefits

The compensation judge granted the self-insured employer's petition to discontinue, and ordered discontinuance of the employee's temporary partial disability or temporary total disability benefits. In Finding No. 20, the compensation judge stated as follows:

> Based upon a preponderance of the evidence, the self-insured employer may discontinue employee's temporary total disability or temporary partial disability benefits based upon the February 23, 2000 service of Dr. Barnett's report because employee reached MMI without any permanency or restrictions related to the October 6, 1998 incident. The employee had no new clinical findings after the October 6 incident and any restrictions or permanency related wholly to her preexisting back condition.

(Finding No. 20.)

The insurer filed its NOID on March 6, 2000, at which time the employee was being paid temporary total disability benefits. On May 4, 2000, when the employer filed a Petition to Discontinue, the employer was paying ongoing temporary partial disability benefits, since the employee had subsequently returned to work at a wage loss. Temporary total disability benefits were not at issue at the hearing. Maximum medical improvement has no relevance to entitlement to temporary partial disability benefits. Rather, receipt of such benefits depends on other factors, including the principles of Kautz v. Setterlin Co., 410 N.W.2d 843, 40 W.C.D. 206 (Minn. 1987). There was no reason for the compensation judge to make findings concerning cessation of temporary total disability benefits, as none were being claimed or paid at the time of hearing. We

therefore vacate Finding 20 and remand the matter to the compensation judge for reconsideration of the discontinuance of temporary partial disability benefits.

In view of our conclusions and remand, we do not address the additional issues included in the employee's motion to set aside the order and in the employee's notice of appeal.