

MARCY A. SCHEIDT, Employee, vs. METRO. TRANSIT COUNCIL, Self-Insured Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 2, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - JOB OFFER. Substantial evidence supports the compensation judge's finding that the employee did not unreasonably refuse to accept an offer of gainful employment, as the offered job would greatly alter the reasonable and responsible pattern of life for the employee.

Affirmed.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Paul V. Rieke

OPINION

MIRIAM P. RYKKEN, Judge

The self-insured employer appeals from the compensation judge's determination that the employee did not refuse an offer of gainful employment which she could perform in her physical condition, and from the compensation judge's denial of the employer's petition to discontinue. We affirm.

BACKGROUND

Ms. Marcy Scheidt (employee), sustained an admitted injury to her left knee on October 11, 1999, as she was exiting her bus at the end of her driving shift. On that date, the employee worked as a bus operator for the Metropolitan Council (self-insured employer). At the time of her injury, the employee was 47 years old, and earned a weekly wage of approximately \$778.00.

The employee struck her left knee on the bus's steering column, noticed immediate intense pain in her knee, and reported the incident to her supervisor. She received medical treatment in the Occupational Medicine Department at Park Nicollet Clinic. Dr. David Parker initially diagnosed her condition as a contusion, prescribed crutches and ibuprofen, and released her to return to work at a seated job.

The employee received ongoing conservative care, including physical therapy, through Dr. Parker. By November 17, 1999, Dr. Parker released the employee to driving for two hours per day; by December 4, 1999, he decreased her restrictions to four hours of driving per day.

However, the employee did not return to work at that point. By mid-December, Dr. Parker referred the employee for an orthopedic consultation and restricted her again to a seated job, with no driving. (Ee. Ex. A.) Dr. Christopher Olson, orthopedist, examined the employee on January 11, 2000. Dr. Olson diagnosed a non-union of previous tibial plateau fracture, with subluxation of the medial meniscus into the displaced medial tibial plateau fragment. According to his report of January 24, 2000, Dr. Olson assigned the following work restrictions for the employee: no deep squatting or running, frequent lifting up to ten pounds, and occasional carrying up to 20 pounds; no walking on uneven ground or climbing stairs on a regular basis.

Dr. Olson ultimately recommended surgery to the employee. On April 11, 2000, he performed surgery in the nature of an open reduction and internal fixation, with bone grafting to repair the old non-union fracture. Dr. Olson released the employee to return to work in June 2000, with physical work restrictions limiting her to sedentary employment only.

The employee has a significant medical history relative to her left knee. In July 1990, the employee was injured when she was struck by an automobile while crossing a street. She was diagnosed as having an avulsion fracture of the left medial tibial plateau, as well as a skull fracture. She underwent left knee surgery on November 19, 1990, which included the placement of a pin to unite her fractured bone. By September 1991, the employee was released to return to work without restrictions. According to the history the employee has provided to her doctors, she claims she had no ongoing problems or difficulties with her left knee, but for a work-related temporary strain in January 1998, until her October 1999 injury.

On June 14, 2000, Dr. Gary Wyard examined the employee at the request of the employer. Dr. Wyard concluded that the employee's left knee condition and resulting disability was ongoing as a result of her original injury in 1990. Dr. Wyard concluded that the work-related injury the employee sustained on October 11, 1999, did not cause or substantially contribute to the non-union of the employee's prior fracture in her left knee. Dr. Wyard found no causal relationship between the employee's October 1999 left knee injury and her subsequent medical treatment, April 2000 surgery, ongoing disability and physical work restrictions.

By July 2000, the employee started working at a transitional, light-duty job in the MTC marketing department. That job required walking and climbing stairs, and was determined to be physically inappropriate for the employee. On August 3, 2000, the employee started at a light-duty job counting bus fare money. This job was within her physical work restrictions, and the employee performed this work for a few days, but then became ill with an infection and was unable to work for approximately two days. While the employee was off work, this job was filled by another employee and was no longer available to the employee.

On September 5, 2000, the employer placed the employee in a third light-duty job, as a maintenance clerk at the Snelling garage in St. Paul, with a work shift extending from 7:00 p.m. until 3:00 a.m. Although the employer did not provide the employee with a written description of this job when she started, the employee testified that she previously held this position and knew the required job tasks. (T. 107.) The primary requirements of the job included sitting at a desk and answering phones, coordinating service calls, entering data from fuel tickets and performing other paperwork duties. In addition, the employee was required to go out into the bus

yard and gather information, including fuel tickets from the fueling area, approximately four times per work shift.

The employee worked at the Snelling garage for approximately two weeks, and collected the fuel tickets on her own throughout that time. She testified that she walked in the garage area four times each night to collect fuel tickets, and that she had to walk with her cane, walking around busses, crossing metal drains and climbing over hoses in order to collect the tickets. (T. 84-85.) Although not clearly delineated in the record, apparently the employee's supervisor at the Snelling garage initially agreed to gather the fuel tickets from the busses so that the employee could avoid walking. However, the employee testified that she believed that her supervisor did not want to perform this task, based on her observation of his demeanor and her interpretation of his body language and facial expressions, even though he never informed her otherwise. The employee testified that she didn't ask the supervisor to gather the fuel tickets since she would rather do it herself, and that she never discussed this issue with him. (T. 78-80.) An employer representative testified that they had provided a motorized cart at the Snelling garage available for the employee's use, but the employee claims she was not specifically advised she could use that cart, nor was she shown how to operate the cart, and she did not ask to use it. (T. 81.)

By September 15, 2000, the employee voluntarily discontinued this job. She advised the employer's assistant transportation manager that she did not wish to continue the job due to the walking required, and that she felt uncomfortable asking the supervisor to collect the fuel tickets. (T. 24-25, 29.) The employee testified that she was afraid of falling while walking on the bus garage floor due to water, oil and fuel spilled on the floor and hoses on the floor in the fueling area.¹ The employee apparently contacted her QRC to complain about her concerns with walking on the floors, and she discontinued her job at the Snelling garage, in part, due to the physical nature of the job.

On September 20, 2000, the employer filed a notice of intention to discontinue benefits, seeking to discontinue the employee's temporary total disability benefits on the grounds that her October 11, 1999 injury neither caused nor substantially contributed to her disability.

On October 4, 2000, the assistant transportation manager telephoned the employee to offer her a maintenance clerk job at a different location, the Martin J. Ruter garage. This was the same job she performed at the Snelling garage, but apparently there was an understanding that the perceived problems with the prior supervisor would no longer be an issue for the employee. The maintenance manager at the Ruter garage testified that the employee could use a battery operated cart to perform the data-gathering portion of this job, and that supervisors would be willing to assist her with gathering the fuel tickets from the garage. The hours of employment for this job were to be from 7:00 p.m. to 3:00 a.m., the same hours she had worked at the maintenance clerk job at the Snelling garage. The employee refused the job. She testified that she did so because she was fearful of falling at work, as she believed the physical working conditions would be similar to those at the Snelling garage, i.e., a slippery floor and hoses to walk around. She also

¹ An employer representative testified that there is water on the garage floors from the bus wash rack as well as fuel spills "from time to time." (T. 48-49, 51.)

testified that she did not want to have trouble from her supervisor if he had to perform part of the job, and she further testified that she believed her marriage would end in divorce due to her husband's dislike of her working the night shift. The assistant transportation manager testified that the sole reason provided by the employee for her refusal of the offer was the detrimental effect the night shift would have on her marriage.

On October 16, 2000, following the employee's refusal of this latest job offer, the employer filed a notice of intention to discontinue benefits as of October 10, 2000. In that notice, the employer stated that "the employee was offered a light-duty position consistent with her physical limitations as of 10/4/00 but declined the job for reasons unrelated to her disability." Following an administrative conference held on November 13, 2000, a compensation judge denied the employer's request to discontinue the benefits, finding that there were no reasonable grounds to discontinue those benefits. The employer and insurer appealed, petitioning to discontinue temporary total disability benefits, alleging that the employee's 1999 injury neither caused nor substantially contributed to her disability and that the employee unreasonably refused the employer's offer of gainful employment that the employee could do in her physical condition.

On February 6, 2000, the employer's petition to discontinue was addressed at a hearing before a compensation judge. In a Findings and Order served and filed February 9, 2001, the compensation judge found that the employee's October 11, 1999, work-related injury to her left knee was a substantial contributing factor to the employee's ongoing left knee related problems, disablement and need for surgery. (Finding No. 13.) The employer did not appeal from this finding.

The compensation judge also found that the employee had not refused to take a gainful employment job which the employee could do in her physical condition, and that the job was not physically suitable for the employee. The compensation judge also found that the offered employment would greatly alter the employee's reasonable and responsible pattern of life and therefore was not considered to be gainful employment. (Finding No. 14.) The compensation judge denied the employer's petition and amended petition to discontinue benefits, and concluded in his memorandum that all appropriate efforts should be made to assist the employee in finding suitable work activity. The self-insured employer appeals.

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, "[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). 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.

DECISION

The compensation judge found that the employee did not unreasonably refuse an offer of gainful employment, as the offered job during a night-time shift would greatly alter the reasonable and responsible pattern of life for the employee, and was not physically suitable for the employee. The self-insured employer appeals, arguing that the job offered by the employer that the offered job did not alter any established or set schedule that the employee had in place prior to her injury, and was a job which the employee could physically perform with accommodation offered by the employer. The issue before this court is whether the compensation judge’s findings are supported by substantial evidence of record and are not clearly erroneous.

Pursuant to Minn. Stat. § 176.101, subd. 1(i),

Temporary total disability compensation shall cease if the employee refuses an offer of work that is consistent with a plan of rehabilitation . . . or, if no plan has been filed, the employee refuses an offer of gainful employment that the employee can do in the employee’s physical condition.

The employer argues that it should be allowed to discontinue payment of temporary total disability benefits because the employee unreasonably refused an offer of employment that the employee was physically capable of performing.

An employee may reasonably decline a job offer in instances where acceptance of the offered job would “dramatically alter a reasonable and responsible pattern of living.” Punt v. Bayliner Marine Corp., 44 W.C.D. 372 (W.C.C.A. 1990). See also Riley v. Chuck Meuer’s Restaurant, slip op. (W.C.C.A. March 14, 1990). The employer argues that the night shift offered to the employee did not dramatically alter her pattern of living, and therefore cannot serve as a basis for determination that the refusal of that job offer was reasonable.

The employee worked full-time as a driver since 1994. Prior to her injury, the employee worked as an “extra board driver” which meant that each day she signed up for the next day’s bus routes. (T. 59.) The employee testified that after attaining an adequate level of seniority, she was able to choose better routes. At the time of her injury in 1999, she was driving a mid-day route that commenced at 11:00 a.m. and stopped at 8:00 p.m., a route she had driven for approximately three years over her seven years with the employer. At the time of her 1999 injury, she also worked a night shift 1-2 times weekly as part of her rotation, but preferred working the day shift. (T. 63-64.)

The job the employee performed at the Snelling garage, and the job she was offered at the Ruter garage, required the employee to work from 7:00 p.m. through 3:00 a.m. on a constant basis. The employee had advised her employer of her concerns with the night shift and the effect

that it had on her marriage. The employee testified that she had been married for just over a year, that night work strained her marriage, and that this was one reason she refused the job offer in October 1999.

The employer argues that because the employee did not have an established or set schedule prior to her injury, and that she had driven some evening shifts prior to her injury, the compensation judge erred by concluding that working the light-duty job on the night shift would disrupt her “pattern” of living. The employer distinguishes this case from previous circumstances reviewed by this court which have involved family obligations such as caring for children or disabled family members,² and argues that the employee offered no testimony to suggest that working the night shift would interfere with any similar obligations outside of her work place.

Assessment of the credibility of a witness is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., P.A., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988). A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989). Based upon the employee’s testimony regarding her concerns over working the night shift and the resulting alteration of her pattern of living, there is substantial evidence in the record to support the compensation judge’s finding that the employee’s “concerns with her marriage coupled with the fact that the employee has not had to consistently work at night provide a further basis to determine that the employment offer of October 2000 was not ‘gainful’ for this employee” (Finding No. 14, emphasis in the original), and that the employee reasonably refused to return to work at the Ruter bus garage. The compensation judge did not err by reaching that conclusion. Accordingly, we affirm.

As we have affirmed the compensation judge’s finding that the employee reasonably refused the offered job since it altered her reasonable and responsible pattern of living, we do not address the employer and insurer’s additional arguments concerning the physical suitability of that job.

²See Solem v. Sysco, 54 W.C.D. 423 (W.C.C.A. 1996) (job would interfere with need to care for minor son with serious medical condition); Hillyer v. Jesco, Inc., slip op. (W.C.C.A. Jan. 18, 1994) (the employee had worked a day shift nearly 28 years, and had adopted a set pattern of living, including taking care of his 74-year old, slightly-disabled mother every other weekend); Meongen v. Owens Corning Fiberglass, slip op. (W.C.C.A. June 13, 1991) (child care scheduling).