SANDRA VIGOREN, Employee/Appellant, v. JOSEPH CATERING and FREMONT COMP. INS. GROUP, Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 17, 2001

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - NEUTRAL PHYSICIAN. The compensation judge did not err in accepting into evidence the report of the neutral physician, despite the employee's inability to cross-examine the physician prior to closure of the record, where the employee did not ask the judge to hold the record open until he could depose the physician.

PRACTICE & PROCEDURE; INTERVENORS. Under the circumstances of this case, where the employee withdrew his claim for medical expenses at the beginning of the hearing and informed the court that he would notify the intervenors of this action and advise them when he filed a future claim, to allow them to intervene again at that time, the compensation judge erred in denying the intervenors' claims.

CAUSATION - SUBSTANTIAL CONTRIBUTING CAUSE; PRACTICE & PROCEDURE - EXPEDITED HEARING. Although it is not entirely clear from the record whether the parties specifically asked the compensation judge to rule on causation of the employee's coccygeal pain, the matter would be remanded for resolution of the issue given that both parties agreed that the issue was central to the employee's temporary partial disability benefit claim.

Vacated in part, affirmed in part and remanded.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Ronald E. Erickson.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the judge's findings denying the intervention claims of the intervenors, denying her the opportunity to cross-examine the neutral physician, denying her claim that she is unable to work more than very part-time hours because of her work injury, and refusing to determine the nature of the work-injury. We affirm in part, vacate in part, and remand.

BACKGROUND

The employee was working as an assistant manager for Joseph's Catering [the employer] on July 30, 1999, when she experienced pain in the low back while lifting a meat slicer. She continued to work but sought chiropractic treatment with Dr. Steven Spaniol on August 10,

1999. Dr. Spaniol referred the employee to Dr. George Adam for a neurological consultation. The employee presented to Dr. Adam with severe low back pain that radiated into her right leg. An MRI scan on August 18, 1999, revealed a large central and right-sided disc herniation at the L5-S1 level. Dr. Adam treated the employee with oral prednisone and epidural cortisone injections. When those treatments were unsuccessful, the employee was referred to Dr. Christine Cox for a surgical consultation.

When seen by Dr. Cox on October 26, 1999, the employee complained of "pressure in the low central back and achiness in the right lateral calf." Dr. Cox recommended surgery, and a right L5-S1 hemilaminotomy and microdiscectomy was performed on November 15, 1999. On December 15, 1999, the employee reported to Dr. Cox that she no longer had the feeling of "fullness" in the low back that she had experienced prior to the surgery but that she did still have an achiness on the right that made it very difficult to sit or stand for very long. On March 21, 2000, Dr. Cox completed a work ability form, indicating that the employee could work two hours per day with no heavy lifting, twisting, or bending and that she should change positions as needed. Stating that she had run out of suggestions, Dr. Cox referred the employee to Sister Kenny Institute, "to determine if any other modalities could possibly help her chronic pain."

On March 26, 2000, the employee saw Dr. Andrew Will at Sister Kenny. Recording a history of pain in the tail bone and down the right thigh and calf after the injury in 1999, the doctor prescribed a TENS unit and a change in medications. On April 13, 2000, Dr. Will opined that the employee could work two hours per day, three days per week, with no lifting more than fifty pounds. He changed the employee's restriction to three hours per day, three days per week on May 12, 2000, making those restrictions permanent on June 9, 2000.

On May 25, 2000, the employee was examined by independent medical examiner Dr. Joel Gedan. It was Dr. Gedan's opinion that the employee's primary complaint was of pain in the coccyx and that that symptom was not a result of the July 1999 injury or the November 1999 surgery. He further opined that the employee could lift up to ten pounds, that she should avoid repetitive bending and prolonged sitting for more than thirty minutes at a time, and that she should be allowed to change her position and stand up as necessary, and he related these restrictions to the employee's coccyx pain. It was further Dr. Gedan's opinion that there was no medical reason to limit the number of hours that the employee could work in a day.

On August 2, 2000, the employer offered the employee full-time employment within Dr. Gedan's restrictions. However, the employee chose instead to continue working the three hours per day/three days per week schedule recommended by Dr. Will.

The employer and insurer filed a notice of intention to discontinue compensation benefits on August 23, 2000, based on Dr. Gedan's release to full-time employment, indicating that the employee had not accepted its job offer and that temporary partial disability benefits would be paid based on an imputed wage from a forty-hour work week. The matter proceeded to an administrative conference, after which the compensation judge approved the discontinuance. The employee then filed an objection to discontinuance.

The employer and insurer requested that the employee be examined by a neutral physician, and a compensation judge granted that request, stating that the neutral doctor was to address the nature of the employee's low back condition, whether it was related to the July 30, 1999, injury, work restrictions, and the employee's need for future medical care. Third Party Solutions, Inc., filed a petition to intervene to recover the cost of medications provided to the employee, and Empi, Inc., filed a motion to intervene to recover the cost of durable medical equipment. On December 26, 2000, a compensation judge granted the intervention requests, indicating that Empi and Third Party Solutions would be parties and be allowed to fully participate in the hearing.

When the neutral physician originally selected by the compensation judge was not available, an amended order was filed, naming Dr. Robert Hartman as the neutral physician. Dr. Hartman's examination had to be rescheduled for a date after the hearing, and an order filed on January 29, 2001, directed that the hearing record remain open for a period of twenty-one calendar days subsequent to the hearing in order to receive Dr. Hartman's report.

The matter proceeded to hearing on February 16, 2001. At the close of the hearing, the employee's attorney reserved the right to question the neutral doctor once he had the opportunity to see that doctor's report.

Dr. Hartman's January 28, 2001, report was received by the Office of Administrative Hearings on March 1, 2001. In that report, Dr. Hartman opined that there were no physical abnormalities to support the employee's subjective complaints, that it was impossible to causally relate the employee's coccygeal pain to her injury or to the surgery, and that the employee was restricted from lifting, pushing, pulling, or carrying more than fifty pounds from floor to waist, or twenty-five pounds from waist to chest height, with no restriction on hours. On March 2, 2001, counsel for the employee wrote to the compensation judge, explaining that he had determined that the deposition of Dr. Hartman would be necessary but that Dr. Hartman's office had advised him that he would not be available for deposition until April 6, 2001, at the earliest. The employee's attorney reiterated his understanding from the hearing that a findings and order would be issued within thirty days of hearing, assuming that Dr. Hartman's report was received without objection, and he objected to the receipt of the report since the deposition could not be completed within that thirty days. The attorney for the employer and insurer responded that they would be willing to leave the record open until the deposition could be taken. When the employee's attorney did not receive a response from the compensation judge, he wrote again on April 3, 2001, asking for a response, stating, "I am wondering how you want to proceed. I have not yet submitted my closing argument on this case, because I am not sure whether you are going to be accepting Dr. Hartman's report."

On April 17, 2001, the compensation judge filed his findings and order, wherein he found that the intervenors had not established that the claimed supplies and medication costs were necessitated by the employee's work injury, that he would make no finding as to the causal relationship between the employee's claimed coccyx problem and the original work injury as "[t]his decision should not be made on a case involving an Objection to Discontinuance," that the employee had restrictions secondary to the work injury, and the resulting surgery, as outlined by Dr. Hartman, including no restrictions on hours worked. The judge further found that "[a]ny

request to keep the record open beyond . . . April 16, 2001 for purposes of taking Dr. Hartman's testimony by cross examination is denied." The employee 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

1. Intervenors' Claims

The employee contends that the compensation judge erred as a matter of law in denying intervenor Third Party Solutions' claim for reimbursement of medical expenses. We agree. The employee withdrew his claim for medical expenses at the beginning of the hearing, informing the court that he would advise both intervenors of that action and that he would notify the intervenors when a future claim petition was filed so that they could again intervene. It is clear that neither the employee nor the employer and insurer anticipated a ruling on the intervention claims. The employer and insurer contend, however, that the employee appealed only from the judge's finding denying reimbursement to Third Party Solutions, not from the judge's denial of reimbursement to Empi, and that the judge's ruling as to Empi must therefore stand. The employee did, however, appeal from the order in which the judge denied the claims of both intervenors, and the intervenors were not served with the findings and order. Under the particular circumstances of this case, we vacate the judge's findings and order concerning the intervention claims of Third Party Solutions and Empi.

2. Cross-examination of Dr. Hartman

The employee contends that the judge abused his discretion in not allowing the employee the opportunity to cross-examine Dr. Hartman before issuing his findings and order. We are not persuaded.

The file contains two letters from the employee's attorney to the compensation judge concerning the report of Dr. Hartman. In the March 2, 2001, letter, the attorney notified the

judge that he had "determined that it would be necessary to take [Dr. Hartman's] deposition" but stated that he had been advised that the doctor would not be available for a deposition until April 6, 2001, at the earliest. Counsel then went on in that letter to request that Dr. Hartman's report not be received since the doctor could not be deposed within thirty days of hearing. In his follow-up letter of April 3, 2001, the employee's attorney merely inquired as to whether the judge intended to accept Dr. Hartman's report. In neither letter was there any request to leave the record open long enough to permit the taking of Dr. Hartman's deposition. Rather, it is clear from the correspondence that the employee's attorney was only seeking to have Dr. Hartman's report excluded because a deposition could not be taken within thirty days of hearing.[1]

The judge clearly did not err in receiving Dr. Hartman's report into evidence. This was a neutral physician appointed by the court, and the record had been left open for this doctor to examine the employee and issue the report. Had the employee wanted the opportunity to depose Dr. Hartman, he should have made that specific request to the court. We therefore affirm the compensation judge's decision to receive Dr. Hartman's report into evidence, and we deny the employee's request that the matter be remanded to allow him to cross-examine the doctor by deposition.

3. Coccygeal Pain

The compensation judge, at finding thirteen, stated that "[t]he compensation judge makes no decision or finding as to the causal relationship between the employee's claimed coccyx or tailbone problem and the original work injury." Later, in his memorandum, he stated that, "[i]n this case, the Compensation Judge does not believe it is necessary or legally required to make a decision as to whether or not the employee's difficulty or problems with her coccyx are related to the work injury and resulting surgery. This decision should not be made on a case involving an Objection to Discontinuance." At oral argument, the employee contended that the judge erred in refusing to make a determination as to causation for the coccyx pain.[2] The employer and insurer have also indicated that they had intended for the compensation judge to address causation and had submitted evidence on that issue.

While expedited hearings are generally limited to issues raised by the Notice of Intention to Discontinue Benefits, the issues for hearing may be expanded with the agreement of all parties. If the issues are expanded, the compensation judge has sixty days to render a decision. Minn. Stat. § 176.238, subd. 6. The record is not entirely clear as to whether the employee specifically asked the judge to address the issue of causation of the employee's coccygeal

[1] We note that both parties were operating under the assumption that the record would close thirty days after the hearing. We assume that this conclusion was based on an off-the-record discussion, as the transcript contains no evidence of any thirty-day deadline.

[2] In his brief, the employee contended that substantial evidence does not support the judge's determination that the employee's coccygeal pain was not related to the work injury; however, the judge did not make such a finding.

symptoms.[3] However, both parties now contend that a determination of this issue is essential to the employee's claim for temporary partial disability benefits. It does appear that the two issues are intertwined and that justice would best be served by having both issues determined together. For this reason, we remand this case to the compensation judge to determine whether the employee's coccygeal/sacral pain is causally related to her work injury and/or her subsequent surgery and, if so, what the employee's restrictions are with regard to both her low back and coccyx/sacral conditions and whether the employee is capable of working full time in the job offered to her by the employer on August 2, 2000. The decision should be based on the existing record, as both parties indicated at oral argument before this court that they had presented evidence on the issue at hearing.

4. Reluctance to Work

The employee also appeals from the judge's finding that Dr. Cox had released the employee to work two hours a day at light work but that the employee was reluctant to pursue that type of work, contending that substantial evidence does not support that finding. We note initially that we see no necessary connection between this finding and the benefits at issue, and we generally decline to consider appeals of findings that have no practical effect. At any rate, we are not persuaded by the employee's arguments.

In her letter of March 21, 2000, Dr. Cox stated,

> I filled out a Work Ability form for Sandra to include 2 hours per day with no heavy lifting, twisting or bending and she should change positions as needed. Sandra was very reluctant to pursue this at all, but I encouraged her to at least try, as I cannot believe that by this time postoperatively, refraining from work is any more benefit than actually engaging in light duty.

That letter provides substantial evidence to support the judge's finding that the employee was initially reluctant to return to work, and we affirm that finding.

[3] At one point in his opening statement, the employee's attorney acknowledged that one basis for the proposed discontinuance was the opinion by the employer and insurer's examiner, who indicated that the employee's continuing complaints in the coccyx/sacral area were not related to her work injury and that the employee's restrictions would be more severe if that condition were taken into account. However, later in his opening statement, after an off-the-record discussion, the employee's attorney withdrew his claim for medical bills because "the insurer is looking at that as a new issue and an expansion of the issues that might in turn affect the timing of these proceedings." At the same time, it is clear that the employer and insurer wanted the judge to address causation of the employee's coccygeal/sacral pain.