

TRUDITH L. WOLDMOE, Employee, v. KNIGHT RIDDER and TRAVELERS INS. CO.,
Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 6, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including the testimony and opinion of the employee's treating physician, supports the compensation judge's determination that the employee was unable to work and entitled to temporary total disability benefits from and after October 20, 1998 through the date of hearing.

Affirmed.

Determined by: Johnson, J., Rykken, J., and Pederson, J.
Compensation Judge: Danny P. Kelly

OPINION

THOMAS L. JOHNSON, Judge

The compensation judge awarded to the employee temporary total disability benefits from October 20, 1998 through November 17, 2000. The employer and insurer contend the award is not supported by substantial evidence and is inconsistent with the compensation judge's findings filed May 14, 1998. We affirm.

FACTS

Trudith L. Woldmoe, the employee, sustained a personal injury on December 29, 1988, while employed by Knight Ridder, the employer. The employee's weekly wage was \$519.27. The employee slipped and fell striking her head and back on the ground. The employer and insurer admitted liability for the employee's injury. The employee was off work for several days following her injury and then returned to work with the employer at her regular job on a full-time basis. In November 1991, the employee voluntarily terminated her employment with the employer and moved with her husband from Duluth, Minnesota, to California.

In 1996, the employee filed a claim petition seeking payment of temporary total disability benefits from and after November 17, 1991. In preparation for the hearing, Dr. Marvin B. Zwerin was deposed on February 11, 1998. Dr. Zwerin specialized in physical medicine and rehabilitation and was the Director of Outpatient Medical Services at the Kentfield Rehabilitation Hospital in Kentfield, California. He first saw the employee on June 21, 1996 on referral from her treating orthopedic surgeon. Dr. Zwerin diagnosed a post closed head injury; status post C5-6 cervical surgery with an excellent result; recurrent temporomandibular joint (TMJ) dysfunction;

myofascial pain syndrome in the forearm muscles; chronic rheumatoid arthritis and a residual of reflex sympathetic dystrophy (RSD) of the right hand. The doctor opined the employee's personal injury was a substantial contributing factor to a post concussion syndrome, the C5-6 disc injury, her myofascial pain, the TMJ and the RSD. Dr. Zwerin recommended a chronic pain program. He opined the employee was not capable of employment at the time he saw her because of her pain, depression, memory problems and limited tolerance for activity.

In a Findings and Order filed May 14, 1998, Judge Kelly found the employee's personal injury was a substantial contributing cause of the employee's TMJ and headache condition; arthritis of the hands, wrists and ankles; degenerative disc disease of the cervical spine; a closed head injury; bilateral upper extremity RSD; and chronic pain.¹ The compensation judge found the employee failed to conduct a diligent search for employment during the period for which she sought temporary total disability benefits, and the employee failed to prove she was totally disabled from November 17, 1991 through January 14, 1996. The judge found, however, the employee was totally disabled from January 15 through March 11, 1996, while she was recovering from surgery. The compensation judge awarded temporary total disability benefits during that eight-week period but denied the remainder of the employee's claim for wage loss benefits.

Following the first hearing, the employee saw Dr. Gruber at North Bay Pain Care in California for a chronic pain evaluation. She stated she saw Dr. Gruber because the insurer refused to pay for a chronic pain program with Dr. Zwerin. The employee chose not to return to see Dr. Gruber and instead returned to Dr. Zwerin on October 20, 1998. The employee testified she would like to participate in Dr. Zwerin's program but has been unable to receive authorization for the program from the insurer. As of the date of the hearing, the employee had not received treatment for her chronic pain. The employee testified she felt her overall condition was "a little worse" than it was at the time of the first hearing.

In December 1998, the employee filed a second claim petition seeking temporary total disability benefits from and after March 18, 1998. Dr. Zwerin was deposed again on November 13, 2000. The doctor stated he last examined the employee on October 20, 1998, and concluded his physical examination was unchanged from his previous examination on July 1, 1996. The doctor, however, concluded the employee was "subjectively worse. She was more fatigued, having more difficulty with being up and about, having more difficulty with sustained activities and use of the right arm." (Pet. Ex. B at 15.) The doctor again recommended chronic pain treatment. Finally, the doctor concluded that as of October 20, 1998, the employee was barely capable of functioning and would not have been able to compete in the open market for any kind of employment.

In a Findings and Order filed January 16, 2001, Judge Kelly found the employee was unable to work and totally disabled from October 20, 1998 through November 17, 2000. In reaching this decision, the compensation judge stated he relied on the opinions of Dr. Marvin B. Zwerin and the employee's testimony that her condition and symptoms continued and worsened since her 1988 injury.

¹ See Findings 31, 32, 33, 34, 35, and 38, Findings and Order filed May 14, 1998.

DECISION

The appellants appeal the compensation judge's finding that the employee became temporarily and totally disabled on October 20, 1998. The only substantial evidence supporting this finding, appellants argue, comes from the testimony of the employee and Dr. Zwerin. The appellants argue that neither the employee's nor Dr. Zwerin's testimony supports the compensation judge's finding.

In February 1998, Dr. Zwerin testified the employee was unable to work and was totally disabled. In his May 1998 Findings and Order, the compensation judge rejected this opinion, and found the employee could work subject to restrictions. The compensation judge then denied benefits because the employee failed to perform a reasonable and diligent job search. In November 2000, Dr. Zwerin testified he last examined the employee on October 20, 1998, and stated his physical examination was basically unchanged from his previous examination on July 1, 1996. The doctor, however, concluded the employee was subjectively and functionally worse and opined she was totally disabled as of that time. The compensation judge accepted this opinion and awarded temporary total disability benefits. The appellants contend the compensation judge's reliance on Dr. Zwerin's opinion was legally erroneous. Since the employee was not totally disabled in 1998, the appellants argue, she cannot be totally disabled in 2000, absent some change in her condition. Accordingly, the appellants assert substantial evidence does not support the compensation judge's award of benefits. We are not persuaded.

The award of benefits here at issue is for a different time period than those resolved in the first hearing. The doctrine of *res judicata* does not bar litigation of issues not previously litigated. Westendorf v. Campbell Soup Co., 309 Minn. 550, 550-51, 243 N.W.2d 157, 158, 28 W.C.D. 460, 460 (1976). Dr. Zwerin's opinions expressed in the November 2000 deposition were adequately founded and the compensation judge was free to adopt them. That the judge may have rejected the doctor's opinion in the first hearing does not mandate the same result in the second hearing. There is no legal requirement that the employee prove an objective change in her physical condition to establish entitlement to temporary total disability benefits. The compensation judge's reliance on Dr. Zwerin's opinions was reasonable and those opinions support the judge's award of benefits.

In the May 14, 1998 Findings and Order, the compensation judge found the employee suffered from chronic pain as a result of her personal injury and noted a pain program had been recommended. The employee has not yet received treatment for her chronic pain. Dr. Zwerin testified that due to the chronic pain the employee was not "progressing independently because her functional capacity was reduced, because she was unimproved in her ability to do self pain management, and because she continued to have loss of function and loss of ability to engage in activities of daily living." (Pet. Ex. B at 16.) The compensation judge could reasonably conclude the employee's chronic pain problem rendered her totally disabled and unable to work as of October 20, 1998 and continuing. The judge's award of benefits is affirmed.