

AUG 11 2016

WORKERS' COMPENSATION
COURT OF APPEALS

STATE OF MINNESOTA

WORKERS' COMPENSATION COURT OF APPEALS

No. WC16-5908

Tammy L. Myers,

Appellant,

v.

Super 8 and Midwest Family
Mutual Insurance Co.,

Respondent,

and

Mayo Clinic and
Essentia Health,

Intervenors.

Bailey Law Office Ltd.
John P. Bailey
1331 Anne Street NW
Bemidji, MN 56601

Brown & Carlson, P.A.
Darren B. Glur
5411 Circle Down Ave.
Minneapolis, MN 55416-1311

The employee's appeal, filed on January 4, 2016, from the Findings and Order of Compensation Judge John R. Baumgarth, served and filed on December 8, 2015, later amended on December 18, 2015, came on for oral argument on May 23, 2016, before Deborah K. Sundquist, Patricia J. Milun, and Manuel J. Cervantes, Judges of the Workers' Compensation Court of Appeals.

Based on all of the pleadings in the case, the transcript of evidence taken before the compensation judge, the exhibits entered into evidence, and the briefs and arguments of counsel, the court is of the opinion that the Findings and Order of the Compensation Judge are in accord with the evidence and law in the case.

NOW, THEREFORE, this court AFFIRMS the Findings and Order of Compensation Judge John R. Baumgarth, served and filed on December 8, 2015, and later amended on December 18, 2015.

BY THE COURT:



DEBORAH K. SUNDQUIST, Judge

OPINION

DEBORAH K. SUNDQUIST, Judge

Where substantial evidence supports the temporary nature of the employee's work injury, the compensation judge's findings that the employee is not entitled to ongoing temporary total disability or vocational rehabilitation benefits is affirmed.

BACKGROUND

The employee, Tammy Myers, began work as a housekeeper for the employer, Super 8 motel, on July 15, 2012. Six weeks later, on August 28, 2012, the employee reached to clean the upper portion of a shower in a motel room when she slipped and fell on her right knee. Admitting liability, the employer and insurer paid ongoing benefits.

Before the work injury happened, the employee had a medical history of right knee complaints beginning in 1987. She was diagnosed with chondromalacia of the right knee in 1993. About one year before the work injury, in August 2011, the employee complained of a worsening of right knee pain that she had on and off for years. An MRI in 2011 confirmed that she had mild chondromalacia without other abnormalities.

The day after the work injury, on August 29, 2012, the employee saw Dr. Clarice Konshok at Essentia who noted swelling on examination. An x-ray image taken on the same day showed a "tiny right knee effusion or synovitis." Dr. Konshok took the employee off work, initially for one week, and then for several months. When the employee's condition and pain complaints continued, she underwent an MRI scan on October 23, 2012 which showed no significant abnormality of the right knee.

On December 3, 2012, the employee was released to return to work in "seated work only." A few weeks later, the employee was evaluated by an orthopedic surgeon, Dr. Francis C. Cormier on December 27, 2012. Dr. Cormier released the employee to work with restrictions of no squatting or kneeling, limited climbing, pushing, and pulling, and other less limiting restrictions for a period of three months.

Dr. Cormier again examined the employee, on February 21, 2013, and ruled out surgery and patellar injection as too risky. Dr. Cormier suggested that time and modified activities were the best approach to the employee's condition. Continuing the work restrictions, he ordered a physical therapy (PT) evaluation, provided the employee with a home TENS unit, and referred the employee for a functional capacity assessment (FCA).

On March 12, 2013, the employee underwent the first of two FCAs at St. Joseph's Area Health Rehabilitation Services which determined that the employee restrictions were to occasionally lift up to 60 pounds, avoid frequent walking or standing, avoid continuous bending when standing, and avoid stair climbing.

In a follow-up examination on March 29, 2013, Dr. Cormier adopted the FCA results as work restrictions. He noted that she had undergone extensive conservative treatment. He diagnosed the employee's condition as chronic tendinitis of the inferior pole of the right patella. Offering no further treatment to address the condition of the employee's right knee, he extended the option to the employee of seeking a second opinion.

A second orthopedic opinion was offered on April 18, 2013, by Dr. Terrance L. Johnson. Dr. Johnson noted a "fairly mobile" right patella, significant reduction in size of the right quad, and right leg deconditioning. Dr. Johnson recommended aggressive PT and pain control/pain management. Like Dr. Cormier, Dr. Johnson also ruled out surgery as an option.

On May 21, 2013, the employee began PT. She reported improvement going up and down stairs. She showed good range of motion (ROM) of her right knee. Her standing posture was observed to be improved and her gait displayed less limping. The employee described pain with squatting and kneeling. The therapy notes reflect that the employee was still weak in the right hip and right quad.

The employee underwent the second FCA on September 30, 2013. The employee was able complete all of the tests assigned and was rated as giving full effort on all of the tests. The evaluator noted that the employee's performance was improved over the March 12, 2013 FCA. She was to avoid prolonged weight bearing activity, avoid stair climbing, and occasionally could lift up to 70 pounds. The FCA concluded that she was safe to work within these guidelines.¹ Dr. Konshok agreed with the FCA results and released the employee to work on October 31, 2013.²

Several months passed, and on February 4, 2014, the employee presented with chronic right knee complaints to Dr. Mark E. Morrey of the Mayo Clinic. Dr. Morrey noted that the employee experienced some improvement on gabapentin. He believed that she may benefit from "chronic pain service," as well as physical therapy and a discussion with a neurologist. The employee followed up with a neurologist, Dr. Ana Patricia Groeschel at the Noran Clinic in June 2014. Dr. Groeschel ordered an EMG and released the employee from her care when the EMG came back "normal."

¹ Employee's Exhibit H.

² Employee's Exhibit K.

A few months later, with continued chronic right knee pain complaints, the employee sought treatment again with the Essentia clinics. On September 15, 2014, she saw Physician Assistant – Certified (PA-C) Elizabeth Hirt who took her off work entirely. PA-C Hirt’s assessment not only included a diagnosis of patellar strain, but also a diagnosis of “low back pain.” PA-C Hirt suggested a referral back to the Mayo clinic for more neurological study, but that was declined.³

In a subsequent office visit, on October 23, 2014, PA-C Hirt concluded that the employee reached maximum medical improvement (MMI), and that there was no permanent partial disability (PPD) rating appropriate for the injury. The latter opinion was amended to indicate that PPD was too early to determine as there had not been a “lumbar spine” evaluation and the employee’s continued pain arises from an unknown cause. Subsequent visits were directed toward prescription medication management.

The employee underwent an independent medical examination by Dr. David Carlson in November 2014. In Dr. Carlson’s narrative report of November 19, 2014, he noted that the employee’s right leg was shorter than her left leg and the employee used a shoe lift. Dr. Carlson reported that the employee walked with a slight limp and favored her right leg. He observed no limitation in ROM of any of the employee’s joints. Dr. Carlson assessed the employee’s strength as 5/5 in all major muscle groups. He observed “a little bit of quad atrophy on the right compared to that on the left indicating some mild weakness.”⁴ He opined that the treatment for the employee’s right knee was excessive as the condition should have resolved in six to eight weeks and no objective findings support further treatment of the right knee related to the August 28, 2012 work injury. Dr. Carlson concluded that the employee was “capable of working and performing all of her activities of daily living without any limitations or restrictions as a result of the right knee injury”⁵

Based on the opinions of Dr. Carlson and PA-C Hirt, the employer and insurer filed two separate notices of intention to discontinue benefits (NOID) on December 16, 2014, citing MMI and causation as the basis to discontinue temporary total benefits. The employer and insurer’s discontinuance of temporary total was granted as of December 22, 2014. At the time, the employer and insurer had paid 123 weeks of the 130 week maximum prescribed by Minn. Stat. § 176.101, subd. 1(e). The employer and insurer also filed a Rehabilitation Request seeking to terminate vocational rehabilitation based on Dr. Carlson’s report. The Department of Labor and Industry denied the request to terminate vocational rehabilitation.

³ Employee’s Exhibit B.

⁴ Employer’s Exhibit 1.

⁵ Id.

On September 3, 2014, the employee filed a Claim Petition. On February 2, 2015, the employer and insurer filed a Request for Formal Hearing on the vocational rehabilitation issue. On February 25, 2015, the employee filed an Objection to Discontinuance. All issues were consolidated for hearing.

The case came on for hearing on January 21, 2016. The issues before the compensation judge were described by the employee as: 1) whether the employee reached MMI; 2) whether continued TTD was appropriate for seven more weeks; 3) whether the employee was entitled to ongoing vocational rehabilitation; and 4) whether the employee had ongoing restrictions. At the hearing, the employee withdrew a request for medical treatment in the form of pain clinic treatment, as there was no specific proposal for such medical care from a treating physician. The parties stipulated that there was no low back issue being presented for determination.⁶ The compensation judge identified the basic issue as whether the employee had a temporary or permanent injury of the right knee.

The compensation judge found that the employee sustained only a temporary injury to her right knee which fully resolved without restrictions, and that the employee's entitlement to temporary total disability was properly terminated on December 22, 2014. He found that the employee was not in need of medical treatment subsequent to service of Dr. Carlson's November 19, 2014 report. He further found that the employee had reached MMI on September 24, 2014, adopting both the opinions of PA-C Hirt and Dr. Carlson. As no restrictions were identified by Dr. Carlson as appropriate, the compensation judge also denied the request for ongoing vocational rehabilitation services. 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. 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 Foods Products, 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.

⁶ Transcript at 18-19.

DECISION

On appeal, at oral argument, the employee clarifies her position that the employee has not reached MMI because she has yet to undergo chronic pain treatment recommended by a number of medical providers. Because the employee has not undergone the chronic pain treatment, she argues that she has not yet reached MMI. Without reaching MMI, she argues that temporary total disability cannot be discontinued. The employee also argues that the employee has restrictions and therefore the judge erred in terminating vocational rehabilitation. The employee further argues that because causation was not at issue, the judge erred as a matter of law in finding that the employee's injury was temporary in nature. Finally, the employee argues that because Dr. Carlson's opinion lacked adequate foundation, the compensation judge erred in reliance upon Dr. Carlson's conclusions.

In response, the employer and insurer argue that the compensation judge's choice of medical expert, Dr. Carlson, was justified and supports the termination of both vocational rehabilitation and temporary total benefits.

Chronic Pain and Application of Minn. R. 5221.6600

First, we will address the employee's argument that the compensation judge erred by not applying Minn. R. 5221.6600, governing chronic pain, a type of medical treatment. As pertinent to this proceeding, Minn. R. 5221.6600 states:

If a patient continues with symptoms and physical findings after all appropriate initial nonsurgical and surgical treatment has been rendered, and if the patient's condition prevents the resumption of the regular activities of daily life including regular vocational activities, then the patient may be a candidate for chronic management.

It should be noted that the employee did not submit a request for approval of a pain clinic or chronic pain treatment and therefore the issue of whether chronic pain treatment was reasonable and necessary was not before the compensation judge.⁷ This fact alone appears to render the employee's argument misplaced. Nevertheless, the results of the employee's September 30, 2013 FCA demonstrates that the employee is not restricted in the manner contemplated by Minn. R. 5221.6600. There is substantial evidence in the record that the employee has not been prevented from the resumption of the regular activities of daily life including regular vocational activities. Thus the plain language of the rule precludes any award of medical treatment based on Minn. R. 5221.6600. While it is possible that the employee suffered from chronic pain, the compensation judge chose the opinion of Dr. Carlson, that the employee required no further medical care, over the opinions of the employee's treating doctors

⁷ Transcript at 16.

that a chronic pain program may help. Absent a lack of foundation, we must affirm the compensation judge's finding.

Causal Relationship of Work Injury to Knee Condition

We next address the employee's argument that the issue of causation of the employee's right knee symptoms was not an issue before the compensation judge and therefore he improperly expanded the issues.

At the hearing, both the employer and insurer and the compensation judge identified as an issue the temporary nature and resolution of the August 28, 2102 right knee aggravation.⁸ In adopting Dr. Carlson's opinions, the compensation judge found that the employee's injury to the right knee on August 28, 2012 was temporary in nature.⁹ The medical record establishes that the employee was not a surgical candidate and had multiple diagnostic tests which were unremarkable. There was no permanent partial disability rating assigned to the right knee. While the employee had right leg atrophy and pain complaints, she was released to work by her treating physician with minor restrictions. Dr. Carlson's report, which was adopted by the compensation judge, provides substantial evidence that that the injury was temporary in nature.

IME Opinion Regarding Knee Condition

We next address the employee's argument that the opinion of the IME, Dr. Carlson, cannot be relied upon in this matter due to a lack of foundation for his opinion. The employee argues that Dr. Carlson overlooked objective evidence in arriving at his conclusion. The employee raised no objection to the foundation of Dr. Carlson's opinion at the hearing. More importantly, the claimed lack of foundation is not supported by the record as the IME describes the mechanism of injury, recounts the employee's medical care received due to the work injury, and is within the medical competence of the examiner. Grunst v. Immanuel-St. Joseph Hosp., 424 N.W.2d 66, 40 W.C.D. 1130 (Minn. 1988); Suess v. St. Jude Med., Inc., 69 W.C.D. 470, 473 (W.C.C.A. 2009). Dr. Carlson had adequate foundation for his opinion on the employee's condition.

The employee's contention regarding overlooked evidence is based on the observed right quad atrophy and the employee's gait. The evidence in the record is clear that the IME, Dr. Carlson, noted both of these conditions in arriving at his opinions regarding causation and the nature of the employee's knee condition. The compensation judge could reasonably rely upon Dr. Carlson's medical opinion in arriving at findings in this matter. As there is adequate foundation for the medical opinion adopted by the judge, this court will uphold the compensation

⁸ Transcript at 14 and 17.

⁹ Finding 14.

judge's choice among medical experts. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985).

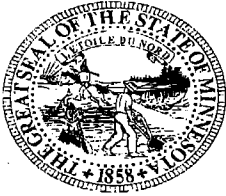
Temporary Total Disability Determination

Next, we address the employee's argument that discontinuance of TTD benefits is inappropriate when the employee has not undergone all recommended treatment, which in this case, was treatment for chronic pain as outlined in Minn. R. 5221.6500. While the employee is correct that chronic pain treatment was recommended by several of the employee's treating doctors, the compensation judge chose the medical opinion of Dr. Carlson which established that no further medical treatment was warranted, that the medical treatment rendered had been excessive, and the employee's condition had resolved. Discontinuance of temporary total disability benefits is appropriate where an employee has "suffered no residual disability from his work injury." Kautz v. Setterlin Co., 410 N.W.2d 843, 845, 40 W.C.D. 206, 208 (Minn. 1987). Furthermore, both Dr. Carlson and PA-C Hirt opined that the employee had reached MMI and had no ratable disability. While PA-C Hirt had continued to restrict the employee from work, that restriction was based on the employee's low back complaints. Similarly, PA-C Hirt's later opinion that a ruling on PPD was premature arose from the claim of a low back injury resulting from the August 28, 2012 work injury. The condition of the employee's low back was explicitly not at issue before the compensation judge. Substantial evidence supports the compensation judge's discontinuance of TTD benefits to the employee.

Termination of Vocational Rehabilitation

Last, we address the employee's argument that because she had ongoing restrictions, she is entitled to vocational rehabilitation. While it is true that the FCA indicated that the employee had minor restrictions, the compensation judge adopted Dr. Carlson's opinion that the work injury was temporary, had resolved, and that the employee could work without restriction. As the compensation judge found that the work injury no longer resulted in restrictions, he properly terminated vocational rehabilitation benefits. Wiggin v. Marigold Foods, No. WC04-136 (W.C.C.A. July 29, 2004) (adoption of IME report finding no restrictions sufficient to terminate rehabilitation services). Had the compensation judge specifically delineated the basis for termination of vocational rehabilitation pursuant to Minn. Stat. § 176.102, subd. 8, and accompanying rules, this court would have benefitted from such clarity. Even in the absence of such delineation, we are compelled to affirm his decision to terminate vocational rehabilitation based on the record as a whole.

359.16827



STATE OF MINNESOTA
Workers' Compensation Court of Appeals
Minnesota Judicial Center
25 Rev. Dr. Martin Luther King Jr. Blvd.
St. Paul, Minnesota 55155
(651) 539-1210
Fax: (651) 539-1212

For TTY/TDD users only:
via MN Relay Service
dial 1-800-627-3529

RECEIVED

PROOF OF SERVICE

No. WC16-5908

AUG 15 2016

STATE OF MINNESOTA)
COUNTY OF RAMSEY) SS

Brown & Carlson P.A.

Donna Odegaard certifies that as an employee of the Minnesota Workers' Compensation Court of Appeals s/he served a true and correct copy of the attached **Decision**, by placing it in a properly addressed envelope delivered to the Department of Administration Central Mail service for deposit in the U.S. Mail in the City of St. Paul, Minnesota, in accordance with Minn. Stat. § 16B.49, on **August 11, 2016**, addressed as follows:

TAMMY MYERS
38273 109TH AVE
MENAHA MN 56464

SUPER 8
***UNDELIVERABLE

MIDWEST FAMILY MUTUAL INSURANCE
PO BOX 9425
ATTN: KAREN FREDERICK
MINNEAPOLIS MN 55440


ESSENTIA HEALTH
ATTN: KAREN SIROIS
520 E 4TH STREET STE 2
DULUTH MN 55805

MAYO CLINIC/ OBO HLTH
ATTN: STACIE SCHMID
200 1ST ST SW
ROCHESTER MN 55905

JOHN BAILEY
BAILEY LAW OFFICE
1331 ANNE STREET NW
BEMIDJI MN 56601

DARREN GLUR
BROWN & CARLSON STE 100
5411 CIRCLE DOWN AVE
MINNEAPOLIS MN 55416

Signed



Donna Odegaard