

NO. A07-932

State of Minnesota
In Supreme Court

Mary R. Olds,

Employee-Respondent,

v.

Lutheran Social Services,

Employer-Relator,

and

Self-Insured, administered by CompCost,

Insurer,

and

Twin Cities Spine Center,

Intervenor.

BRIEF AND APPENDIX OF EMPLOYER-RELATOR

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LEGAL ISSUES

- I. WHETHER AND HOW THE DETERMINATION OF AN EMPLOYEE'S CLAIMED PERMANENT TOTAL DISABILITY STATUS SHOULD TAKE INTO ACCOUNT THE EFFECT OF THE EMPLOYEE'S RECEIPT OF SSDI BENEFITS AND THE CONSEQUENT LIMITATION PLACED ON THE EMPLOYEE'S SUPPLEMENT INCOME.

An Employee's status as permanently totally disabled is a vocational measurement and the Employee's receipt of SSDI benefits and the limitations this places on the Employee's supplemental earning capacity must be considered in the determination of whether an the work injury has rendered the Employee as permanently totally disabled.

- II. WHETHER THE WCCA PROPERLY STATED THE FACTUAL RECORD AND INTERPRETED THE LAW REGARDING THE OFFSET OF SSDI BENEFITS IN REVERSING THE COMPENSATION JUDGE'S DETERMINATION THAT THE EMPLOYER WAS ENTITLED TO OFFSET THE EMPLOYEE'S SSDI BENEFITS FROM THE PAYMENT OF PERMANENT TOTAL DISABILITY BENEFITS.

The WCCA erred by misstating the factual record and misinterpreting the law applying to the offset of SSDI benefits in its decision to reverse the Compensation Judge's decision on this issue, requiring reversal by this Court of the WCCA's decision on this matter.

STATEMENT OF THE CASE

This case touches upon a fundamental principle of the workers' compensation system and its coordination with other forms of government disability benefits; that the costs of a work injury, and specifically in this case, the wage loss resulting from a work injury, should be borne by the Employer as a cost of production. The rationale and policies dictating this principle have long been established under Minnesota law and include the reasoning that an injured Employee should not be required to subsidize the cost of production by personally experiencing the wage loss caused by a work injury. Apart from this consideration, the workers' compensation system is also designed to increase the "employability" and earnings of injured employees whenever possible in lieu of payment of wage loss benefits resulting from the decreased "employability" or earnings attributable to the work injury.

As fundamental and unassailable as this principle is, it comes with a necessary corollary, equally important to the proper functioning of the workers' compensation system although perhaps not as frequently stated or considered. An injured Employee should also not experience a windfall in income as a result of a work injury. Increasing, as opposed to replacing, an injured Employee's income as a result of a work injury is not consistent with either the policy requiring Employer's to pay for the costs of work injuries, or with the goal of increasing the "employability" of injured workers. Simply put, an injured Employee should not earn more due to a work injury than they would have or could have earned but for the work injury.

The combined decisions in this case of the Compensation Judge and the Workers' Compensation Court of Appeals have resulted in just such a windfall to the Employee, and a significant one at that. There is no dispute that the Employee was receiving SSDI benefits throughout the entire period of her employment with the Employer and during the period of claimed workers' compensation benefits. There is no dispute that her receipt of these SSDI benefits limited her earning capacity to roughly \$200/week without jeopardizing those benefits, that she took her position with the Employer to supplement this SSDI income, and that her intention was that her income with the Employer would not exceed this limit. The Employee was earning roughly \$147/week at the time of her second work injury with the Employer and has been able to return to work for the Employer at a wage rate of roughly \$75/week, experiencing roughly an \$80/week decrease in her overall earning capacity. Yet, under the decision of the WCCA, the Employee will receive, in addition to her SSDI benefits, \$457/week in wage loss benefits as a result of the work injury; more than six times the amount of her actual wage loss, almost three times the amount she was actually earning with the Employer and more than twice the amount she could have earned or intended to earn given her receipt of SSDI benefits. Additionally, under the WCCA's decision, the Employee will be entitled to this windfall in benefits for an indefinite period into the future and without the offset of her SSDI benefits.

The WCCA recognized to some degree this inequitable result, but felt compelled to reach this decision based on a misstatement of the factual record and a misinterpretation of the applicable law. The Employer respectfully submits that neither

the facts nor the law in this case compel this inequitable and counterproductive result and request reversal of this decision.

STATEMENT OF FACTS

This matter initiated as a claim for workers' compensation benefits by the Employee, Mary Olds (hereinafter "Employee") relating to two admitted work injuries she sustained on April 1, 2002 and August 24, 2003 while employed by Lutheran Social Services (hereinafter "Employer"). The initial claim petition claimed entitlement to temporary partial disability and temporary total disability benefits for various periods since the injury dates, but reserved claims for permanent total disability benefits. At the hearing on the claim petition before Compensation Judge Jerome Arnold on July 26, 2006, the Employee asserted a claim for permanent total disability benefits which was denied by the Employer, but counsel for both parties agreed that, at a minimum, temporary total disability or temporary partial disability benefits for periods of wage loss the Employee experienced as a result of the work injuries should be considered as an alternative to the award of permanent total disability benefits. (Transcript of the Workers' Compensation Hearing before Judge Jerome G. Arnold on July 26, 2006, pp. 5-6, 11-13) (hereinafter "T. at ___. Petitioner's Exhibits submitted as part of the record at the hearing a hereinafter referred to as "P.Ex. ___.). Additionally, the parties disputed whether, in the alternative, an award of permanent total disability to the Employee should be offset by the Employee's receipt of SSDI benefits. (T. at 11, 129).

In a decision issued in February 1999 and after a Social Security Administration hearing on December 9, 1998, the Employee was initially awarded SSDI benefits

effective August 14, 1997, the date she ceased her employment as an LPN with a prior employer, Leisure Hills nursing home. (T. at 27-28; P. Ex. M, attached in the Appendix as A-1-13). The SSDI decision stated the Employee was eligible for SSDI benefits due to the combination of her recurrent major depression, fibromyalgia with headaches, and chronic pain syndrome (P. Ex. M). In describing her symptoms and typical day at that administrative hearing, the Employee testified that “she can sit less than an hour before experiencing low back pain.” (Id.) This portion of the SSDI decision was quoted at length by the WCCA in their decision. But of greater import from the SSDI decision is the following passage, which was not referenced in the WCCA decision:

The (Employee) further testified that she had two years of college education and was a licensed practical nurse (LPN). She was working as an LPN in 1997 when she had to stop as she could no longer do the job because of *back pain*, fatigue and difficulty kneeling. (emphasis added)

(P.Ex.M, A-7).

The Employee has received SSDI benefits continuously since the initial award. (T. at 30-31, 85). The Employee testified that, since the initial award, her eligibility for SSDI benefits has been reviewed and renewed on one occasion, when she and her doctor were sent papers to fill out and return. (Id.). She testified that she could not recall the year this review took place, but that it occurred prior to her employment with the Employer. (Id.). However, the initial SSDI decision seems to indicate that her initial award was for benefits through December 2002, implying that the review for eligibility would have occurred around December 2002. (P.Ex.M, A-6). There is no other

indication in the record as to the date of this SSDI review or the basis for the decision to renew the Employee's eligibility for SSDI benefits after this review.

In the interim between the initial SSDI award and the review and renewal of those benefits, presumably in late-2002, the record indicates the Employee did have significant symptoms and treatment for low back and left leg pain. In August 2000, she treated for a lower back "stabbing pain" of 10/10 intensity over the previous two weeks, with radicular symptoms into her left leg. (select medical records from P.Ex. A, attached in the Appendix as A-14-52). She treated for low back pain of two weeks duration in August, 2000 and in April 2001, she reported a fall in her bathtub onto her tailbone with "severe pain" in her lower back and radiating into her left leg. (Id., A-14-19). A May 2001 treatment notes indicates the Employee "has had long term problems with low back pain and upper shoulder and neck pain" and states "she cannot work with this pain at her partime (sic) job pushing wheelchairs at Leisure Hills." (Id., A-19-21). During this period, she had lumbar x-rays and an MRI that showed degenerative changes to her lumbar spine and there is a later reference that she had her job duties at Leisure Hills changed due to these low back symptoms. (Id., A-16-21). In November 2001, she fell again in her bathroom on her tailbone and was reporting "severe back pain extending down the left leg." (Id., A-26-27). She had another lumbar x-ray which showed degenerative arthrosis of the lumbar spine. (Id.).

The Employee had her first low back work injury at the Employer in April 2002 when she fell on some ice, twisting her back and reporting pain in her whole back including her lower back. (Id., A-27-30). On exam, her entire lumbar region was tender,

but it was noted that “typically (she) has some pain down the left lateral leg with (the) original back problem” which was unchanged by this fall. (Id., A-28). In September and October 2002, she again treated for pain in her lower back and both legs and a November 2002 note indicates her “recurrent back pain seems to be in remission at this time.” (Id., A-33-34, 40). On December 31, 2002 and into January 2003, she treated for muscle spasms in her lower back, reporting back pain of 10/10 intensity which had increased of the past two weeks and which she associated with her job duties at the Employer. (Id., A-48-52).

There is no dispute that the Employee’s low back and left leg symptoms became more constant and pronounced after the August 2003 injury and continued through the date of the hearing, when the Employee testified that her low back symptoms were the primary condition affecting her ability to work and her most severe impairment for the purposes of her SSDI benefits. (T. at 87-88, quoted at Finding 38 of the Findings and Order of Judge Arnold dated September 14, 2006 and attached hereto in the Appendix as A-53-61).

The Employee began working for LSS in early-2002 as a “direct support person”. (T. at 19). She testified that this was a part-time position, that she wanted to work to supplement her income from SSDI, but that she knew upon taking this position that she was limited to earning less than her SSDI benefits or she would jeopardize those benefits. (T. at 37-38).

She sustained admitted injuries to her low back at the Employer on April 1, 2002 and August 24, 2003. (Findings 1, 4). The record indicates that the Employee was

working on average approximately 16 hours per week and earning \$147.00 per week as of August 24, 2003, but there is no specific finding to this effect. (T. at 39, 86, 89, 126-27). There is also no record or finding on the Employee's SSDI benefit and consequent limit on her earnings on that date. After the August 24, 2003 work injury, the Employee did not return to work until January, 2006, at which time she was released to return to work with significant physical restrictions and also limiting the amount of hours she could work to 12 hours per week (limited to 2-4 hours per day, three days per week). (Findings 6, 7, 8, 10, 11, 13, 18, 21, 26, 27, and 29). The record also indicates that, since her return to work in January 2006, the Employee had worked between 5-8 hours per week through the date of the hearing. (Finding 30). At her wage of \$9.32 per hour as of the hearing date, this would equate to earnings between roughly \$45.00 and \$75.00 per week. (Olds v. Lutheran Social Services, *3, slip op, MN Workers' Compensation Court of Appeals, April 9, 2007, attached hereto in the Appendix as A-62-69 and hereinafter referred to as "WCCA Decision at __"). The Employee also testified that, as of the date of the workers' compensation hearing, she was receiving \$202.15 per week (\$876 per month) in SSDI benefits. The vocational expert called by the Employer testified that the Employee could earn up to \$198.23 per week without jeopardizing her SSDI benefits. (T. at 31,121).

The workers' compensation hearing before Judge Arnold addressed two issues that are on review before this Court. First, the hearing addressed whether the Employee was entitled to wage loss benefits from August 24, 2003 "as either permanent total disability benefits or alternatively a combination of temporary total and temporary partial disability

benefits.” (Issue 1). If the Employee were found entitled to permanent total disability benefits, a second issue to be addressed was whether the Employer could apply the offset for the Employee’s receipt of SSDI benefits. (Issue 2). Judge Arnold ruled that the Employee’s April 2002 and August 2003 work injuries were permanent and substantial aggravations of her pre-existing low back condition, that the Employee was permanently totally disabled from August 24, 2003 to the date of the hearing, and that the two work injures were substantial contributing causes of her permanent total disability. (Findings 36, 37). Judge Arnold also ruled that the Employee’s pre-existing low back condition also included her “low back chronic pain syndrome listed on the social security award as one of the conditions for which she was awarded disability benefits and, thus, her SSDI benefits received since August 24, 2003 were “occasioned in substantial part” by the low back pain causally-related to these work injures. (Findings 37, 39).

Both parties appealed this decision; the Employer appealing the ruling that the Employee was permanently totally disabled as a result of the two work injuries and the Employee appealing the ruling that those permanent total disability benefits could be offset against the Employee’s receipt of SSDI benefits since August 24, 2003. The WCCA upheld Judge Arnold’s ruling that the Employee was permanently totally disabled as of August 24, 2003 and that the two work injuries were substantial contributing causes of that permanent total disability. While acknowledging that the Employee was only working 16 hours per week prior to the August 2003 injury and that the Employee testified she voluntarily limited her hours so as not to surpass her SSDI income, the WCCA stated that there was “no evidence ... that the employee was limited to working

part time due to any medical restrictions caused by her pre-existing low back condition or by the depression, fibromyalgia or chronic pain syndrome for which she was receiving SSDI.” (WCCA Decision at 5). The WCCA also held that the fact that the Employee’s earnings were only slightly reduced after her August 2003 work injury as compared to her pre-injury earnings was not relevant to the determination of permanent total disability, noting that “(a)s a general rule, whether an employee’s income is insubstantial is not determined by comparing the employee’s pre- and post-injury earnings.” (WCCA at 5) (citations omitted).

Conversely, the WCCA reversed Judge Arnold’s ruling that the Employee’s SSDI benefits since August 24, 2003 were “occasioned by” the same disabling condition as her work injuries and, therefore, could be offset against the permanent total disability benefits. In its decision, the WCCA quoted at length, as had Judge Arnold, a three-paragraph passage from the SSDI decision wherein the Employee described her symptoms and typical day that included the statement that the Employee could “sit less than an hour before experiencing low back pain”, stating this was the only reference in the SSDI decision to the Employee’s low back pain. (WCCA Decision at 7-8). The WCCA did not reference or apparently consider the Employee’s express testimony at that hearing that she had to stop working in 1997 because of her “back pain, fatigue and difficulty kneeling.” The WCCA also did not acknowledge the evidence in the record that the Employee’s SSDI benefits were subject to review and renewal at some point after the initial decision in 1999 or the evidence in the record indicating the Employee was experiencing significant low back symptoms that specifically affected her ability to work

during the period when that review and renewal presumably occurred. More important, while noting the Employee's testimony at the hearing that her low back condition was her "most severe impairment" for both her SSDI and PTD benefits, the WCCA failed to properly consider this important fact and, instead, limited its review to the basis for the SSDI benefits at the time of the initial award in 1999. (Id.).

The WCCA also noted that, as of the date of her August 24, 2003 work injury, the Employee "was working only 16 hours per week" with the Employer. (WCCA Decision at 5). Yet, despite the Employee's testimony that she took this part-time position with the Employer to supplement her SSDI income and that she knew she was limited in her earnings at the Employer because of this, the WCCA stated that there was "no evidence, however, that the employee was limited to working part time due to any medical restrictions caused by her pre-existing low back condition or by the depression, fibromyalgia or chronic pain syndrome for which she was receiving SSDI." (Id.). The WCCA then reviewed the vocational evidence regarding the Employee's employability and earning capacity and affirmed the Compensation Judge's decision that, after her work injury of August 24, 2003, the Employee was not capable of earning more than an insubstantial income, entitling her to PTD benefits. The WCCA's review of this decision, however, is made entirely in light of her work injury, with no recognition or analysis of the effect of the Employee's receipt of SSDI benefits and the limitations this placed on her earning capacity on this determination. (Id. at 5-6).

Finally, the WCCA also recognized that the award of permanent total disability benefits to the Employee in this instance would lead to a windfall to the Employee which

was contrary to the policies and principles underlying the workers' compensation system but held that the plain language of the statute required such a result where the evidence did not support Judge Arnold's determination that the SSDI benefits after August 24, 2003 "were *primarily* due to the employee's low back condition." (emphasis added) (WCCA Decision at 8). The WCCA also concluded, apparently as a matter of law, that the Employee's SSDI benefits could not be occasioned by the same disabling condition as her work injuries where those SSDI benefits were initially awarded before the work injuries. (Id.).

The Employer and Insurer respectfully submit that, in so holding, the WCCA has misstated the factual record and misinterpreted the law and requests reversal of these decisions.

ARGUMENT

I. Standard of Review of WCCA Decisions:

The Employer asks this Court to review two decisions of the Workers' Compensation Court of Appeals: first, affirming the compensation judge's decision that the Employee's August 24, 2003 work injury caused her to be permanently totally disabled after that date and, second, reversing the compensation judge's decision that the Employee's SSDI benefits and PTD benefits as of that date were "occasioned by the same disabling injury or condition", allowing for an offset of SSDI benefits.

When reviewing the WCCA's affirmation of a compensation judge's decision, this Court will not disturb findings on questions of fact unless the finding is "manifestly contrary to the evidence or unless inferences from the evidence clearly require reasonable

minds to adopt a contrary conclusion.” Kirchner v. County of Anoka, 339 N.W.2d 908, 910 (Minn. 1983). This Court is not bound, however, to the WCCA’s conclusions of law supporting its affirmation of a compensation judge’s decision. Sundby v. City of St. Peter, 693 N.W.2d 206, 210 (Minn. 2005).

When the WCCA substitutes its findings for those of the compensation judge, this Court’s review differs and the “inquiry centers on whether the WCCA correctly substituted its findings, and, secondly, if so, whether the WCCA’s substituted findings nevertheless should be set aside.” Gibberd by Gibberd v. Control Data Corporation, 424 N.W.2d 776, 779 (Minn. 1988). In this inquiry, “(t)he focus of our scrutiny of the record is on whether the WCCA’s rejection of the compensation judge’s findings and substitution of its own was clearly and manifestly erroneous in light of its duty not to reject those findings unless they are unsupported by substantial evidence.” Id. (citing, Hengenmuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60 (Minn. 1984)).

II. WCCA’s Decisions Must Also Be Reviewed In Light of and Consistent with the Underlying Principles of the Workers’ Compensation System:

This Court’s review of WCCA decisions should produce a result not only “consistent with the language of the (workers’ compensation) statute but also consistent with “the general compensatory policy of the workers’ compensation law”, which dictate that an employee’s wage loss benefits reflect the “loss in earning capacity due to the work related injury.” Kirchner, 339 N.W.2d at 911-12. This policy springs from the “underlying purpose” of the workers’ compensation system that employers should bear

the costs of work related injuries, such as the lost wages of the injured employee. See, Gibberd by Gibberd, 424 N.W.2d at 784.

Workers' compensation wage loss benefits also are part of a comprehensive system of wage loss protection, including the receipt of SSDI benefits. As recently discussed by this Court in Sundby, both benefits are "for the purpose of replacing ... the wage loss caused by the disability" of the injured employee. Sundby, 693 N.W.2d at 210-11. In Sundby, this Court quoted at length Professor Arthur Larson regarding the "common principle" of this comprehensive wage loss protection system and that these benefits should work in tandem to restore the lost wages of an injured employee. Id. But as Professor Larson noted, and as quoted by this Court in Sundby, it does not follow from this principle that an injured employee should be able to recover, through the combination of these benefits, more than the actual lost wages. Id. (noting that the employee should not be able to recover more than his or her actual wage because "(t)he worker is experiencing only one wage loss and, in any logical system, should receive only one wage loss benefit. This conclusion is inevitable once it is recognized that workers' compensation, unemployment, nonoccupational sickness and disability insurance, and old age and survivors' insurance are all parts of a system based upon a common principle."). The WCCA has also recognized this principle and that an interpretation of the workers' compensation statute that results in an employee receiving wage loss benefits in excess of the actual wage loss is a "windfall" to the employee that is unjust and should be avoided as not consistent with the legislative intent of the statute. Snyder v. Yellow Frieght System, 61 W.C.D. 491, 494 (W.C.C.A. 2001).

It is undisputed that the WCCA's decision in this case produces a result whereby the Employee will receive significantly more in wage loss benefits – combined from her workers' compensation and SSDI benefits – than her actual wage loss. This decision also allows her to “earn” significantly more in wage loss benefits than she could have earned in supplemental wages, given her SSDI award. In both regards, the WCCA's decision runs contrary to the underlying principles of these wage protection benefits and should be closely scrutinized by this Court to determine if such a result is necessary under the facts and the law.

III. In Light of These Underlying Principles and Based on the Factual Record and Applicable Law, This Court Should Reverse the WCCA Decisions.

- A. This Court should reverse, as manifestly contrary to the evidence, the WCCA's affirmance of the Compensation Judge's ruling that the Employee was permanently totally disabled due to the work injury, where the WCCA failed to properly consider the effects of the Employee's receipt of SSDI benefits on that determination.**

The Compensation Judge determined, as affirmed by the WCCA, that the Employee's August 24, 2003 work injury was a permanent aggravation of her pre-existing low back condition and, thus, a substantial contributing cause to the Employee's disabling condition after that injury. This decision is not being appealed herein. But both the Compensation Judge and the WCCA seemed to equate this decision on medical causation for the Employee's disabling condition as tantamount to a finding entitling the Employee to PTD benefits. Neither the Compensation Judge nor the WCCA indicated whether, or how, they considered the Employee's limitation on earnings due to her receipt of SSDI benefits in arriving at this determination regarding her PTD status.

The standard for entitlement to permanent total disability benefits is provided by Minn. Stat. 176.101, subd 5, which states that an employee is permanently totally disabled when:

the employee's physical disability in combination with any one of clause (a), (b), or (c) (relating to the employee's permanent partial disability rating) causes the employee to be unable to secure anything more than sporadic employment resulting in an insubstantial income. Other factors not specified in clause (a), (b), or (c), including the employee's age, education, training and experience, may only be considered in determining whether an employee is totally and permanently incapacitated after the employee meets the threshold criteria of clause (a), (b), or (c).

Minn. Stat. 176.101, subd. 5 (2000).

This Court and the WCCA have recognized that the determination of permanent total disability status under subdivision 5 is really a vocational, as opposed to a medical, determination. See, e.g., McClish v. Pan-O-Gold Baking Co., 336 N.W.2d 538, 542 (Minn. 1983) (“We have noted the concept of ‘total disability’ depends upon the employee’s ability to find and hold a job, and not on his physical condition.”), Thomas v. Layne of Minn., 50 W.C.D. 84, 100 (W.C.C.A. 1994) (“Permanent total disability is primarily dependent on an employee’s vocational potential, rather than his physical condition.”). PTD is, therefore, a measure of the employee’s earning capacity and a determination on PTD benefits must consider all of the relevant facts regarding an employee’s earning capacity, not just the employee’s medical status or restrictions.

In a case such as this where the employee is receiving SSDI benefits that directly and significantly limit the employee’s supplemental earnings, this limit on earnings is clearly relevant to the determination of the employee’s PTD status and must be properly

considered in determining entitlement to PTD benefits. However, this issue – whether and how the Employee’s receipt of SSDI benefits that limited her supplemental earnings effected the determination on her entitlement to PTD benefits – was not addressed by the WCCA in its decision and the WCCA has provided no indication that it considered this important factor.

In this case, the facts indicate that the Employee’s future earning capacity was not primarily or even greatly reduced by the work injury but was primarily reduced by her receipt of SSDI benefits. The Employee testified that she knew from the time she took her part-time position with the Employer that her earning capacity was limited by her receipt of SSDI benefits and that she took the position with the intent to “supplement” her SSDI income. Although the record does not indicate what her SSDI benefit was on August 24, 2003, the Employer’s vocational expert testified that as of the date of the hearing in July 2006, the Employee was limited by receipt of the SSDI benefits to earning no more than roughly \$200/week. The work injury, in contrast, only reduced this already significantly-reduced earning capacity by roughly \$75/week, from \$147/week to \$75/week.

The WCCA missed this important point. While noting that the Employee was only working 16 hours per week at the time of her injury, it stated that “(t)here is no evidence, however, that the employee was limited to working part time due to any medical restrictions caused by her pre-existing low back condition, or by the depression, fibromyalgia or chronic pain syndrome for which she was receiving SSDI.” Whether the Employee’s earning capacity was previously limited by a medical restriction is not

important. What is important is that her earning capacity was significantly limited prior to her work injury and equally after her work injury by her receipt of SSDI benefits, with her work injury providing only a minimal additional restriction on her earning capacity. Neither the Compensation Judge nor the WCCA properly considered the effect of the Employee's SSDI benefits and the consequent limits on her earning capacity in determining that the Employee's work injury rendered her as entitled to permanent total disability benefits.

This issue, in general, appears to be one of first impression before this Court. There are no reported cases directly addressing the issue of how an employee's receipt of SSDI benefits that limit the employee's supplemental earnings should be considered in determining an employee's PTD status. The WCCA has also not addressed this issue directly in prior reported decisions.¹ The Employer respectfully urges that this Court should adopt an approach under this situation that properly considers the effect of the Employee's SSDI benefits on the issue of her PTD status.

¹ In support of its decision, the WCCA cited a series of prior cases regarding the general rule that whether an employee's post-injury earnings are insubstantial is not dependent on or relative to the employee's pre-injury earnings and that "what constitutes an insubstantial income does not change relative to the employee's pre-injury wage." (WCCA at p. 5, citing, for example, Weishaar v. Radisson Hotel South, slip op (MN Workers' Compensation Court of Appeals, September 24, 2002), Detmar v. Kasko Corp, 60 W.C.D. 81 (W.C.C.A. 2000)). However, while these cases analyze this issue in the context of the employee's actual pre-injury earnings, they do not address the issue of pre-injury limitations on the employee's earning capacity and none of these cases involve a fact situation where the employee's pre-injury earnings were limited due to the receipt of SSDI benefits.

One such approach would be for this Court to consider the Employee's SSDI benefits as "actual wages" and calculate the Employee's earning capacity as including these wages. This approach has support in the fact that the SSDI benefits, as well as the PTD benefits, are intended to replace the Employee's lost wages due to her disabling condition. This is also consistent with the concept, as described by the Employee's testimony, that her earnings with the Employer were intended to supplement her primary income, the SSDI benefit. Because the Employee continued to receive her SSDI benefits after the August 24, 2003 work injury, this income should be added to the income she was able to earn when she returned to work to determine if her earning capacity could only produce an insubstantial income, rendering her PTD. The Employer respectfully argues that the combined income of the Employee's SSDI benefits (roughly \$200/week) and her earned income with the Employer as of the date of the hearing (\$45-\$75/week), was not insubstantial income so as to render the Employee as PTD as of that date.

Under this approach, if the employee's combined SSDI benefit and post-injury earnings produce more than an insubstantial income and the employee is denied PTD benefits on this basis, the employee's actual wage loss resulting from the work injury would still be compensable as either temporary total disability or temporary partial disability benefits – based on the reduction in the employee's actual earnings. In this fashion, the employee's wage loss benefit would more clearly equate to the actual wage loss.

In the case at hand, the Employee has received roughly \$200/week in SSDI benefits since August 24, 2003, when she was earning an average of \$147/week. Since

August 24, 2003, she has had periods of no earnings with the Employer when her actual wage loss was \$147/week and periods when she worked at reduced earnings when her actual wage loss was the amount her wages were reduced from her normal earnings (ranging from \$45-\$74/week). The Employer submits that this is the true measure of the Employee's wage loss and entitlement to workers' compensation wage loss benefits. The Employer respectfully requests this Court to award the Employee these benefits in lieu of permanent total disability benefits, in light of this fact that permanent total disability is a measure of earning capacity and in consideration of the principles underlying entitlement to workers' compensation wage loss benefits in coordination with other government disability benefits.

This result is particularly more apt than awarding the employee PTD benefits in light of the functioning of the minimum PTD benefit and the underlying principles regarding the comprehensive wage protection system. Because of the statutory PTD minimum, a finding of entitlement to PTD benefits in this case would result in the Employee receiving \$457/week in wage loss benefits. This PTD benefit is seven times larger than her actual wage loss of roughly \$75/week, and more than twice the amount the Employee *could have received* in supplemental wages under SSDI. Such a result in this or other similar cases is surely contrary to the underlying principles of workers' compensation benefits and their coordination with SSDI benefits.

This contrary result is due to the WCCA's failure to recognize that PTD status is primarily a vocational measurement and that the Employee's receipt of SSDI benefits, which limited her earning capacity, is an important factor that must be considered in

determining PTD status. The Employer respectfully requests this Court to reverse this decision as manifestly contrary to the evidence and applicable law, and to provide guidance to the WCCA on this issue on how the Employee's receipt of SSDI benefits must be considered in determining PTD status.

B. If the Employee is entitled to permanent total disability benefits, the WCCA erred in reversing the Compensation Judge's decision that the Employer was entitled to offset the Employee's SSDI benefits.

The WCCA reversed the decision of the Compensation Judge that the Employee's SSDI and PTD benefits as of August 24, 2003 were "occasioned by" the same disabling condition, thus allowing for the offset of the SSDI benefits under Minn. Stat. 176.101, Subd. 4. The WCCA based this decision on its finding that the record before the Compensation Judge had "no substantial evidence supporting a conclusion that the employee's low back condition was a factor in the award of SSDI benefits." (WCCA Decision at 8). The WCCA reviewed the decision of the Compensation Judge, stating "the only reference in the judge's decision to low back pain was the testimony that she could sit less than an hour before experiencing low back pain." (Id.). Finally, the WCCA concluded that "since the employee was awarded SSDI benefits prior to her personal injuries, we conclude the disability benefits could not be occasioned by the 2002 or 2003 work injuries." (Id.).

The WCCA has stated that "whether the employee's receipt of workers' compensation benefits and social security disability benefits were 'occasioned by' the same injury is a mixed question of fact and law." Hill v. Ed Lutz Construction, 39 W.C.D. 111, 114 (WCCA 1986). In this instance, the WCCA substituted its own factual

findings in reversing the Compensation Judge's finding that both benefits were occasioned by the same disabling condition, and the WCCA also misinterpreted the law regarding the offset. This Court must review the WCCA's substituted factual findings and assess whether the WCCA exceeded its appellate review by reversing findings of the Compensation Judge that were substantially supported by the record, and must review *de novo* the WCCA's interpretation and application of the offset provisions of the statute.

Regarding the WCCA's substituted factual finding, it clearly misstated the factual record before it in stating that the only evidence in the record supporting the Compensation Judge's finding was the Employee's testimony in the SSDI proceeding that she experienced low back pain after sitting for an hour. This omits these three very significant facts in the record supporting the Compensation Judge's finding:

- That the Employee testified at the social security proceeding that *the reason she stopped working in 1997 was because of back pain, fatigue and problems with kneeling* (emphasis added);
- That the Employee's SSDI benefits were reviewed and renewed at some point after the initial award in 1999 and that this review most likely occurred in approximately 2002. Additionally, the medical records before the Compensation Judge included treatment notes indicating the Employee was experiencing significant low back symptoms for much of 2001 and 2002, having experienced non-work related low back injuries and one work-related low back injury during that period;
- That the Employee testified at her workers' compensation hearing that the primary disabling condition for both her PTD and SSDI benefits as of the hearing was her low back condition, which had been substantially aggravated by her August 24, 2003 work injury.

(P.Exs. A, M; T. at 87-88).

These facts alone amply support the Compensation Judge's initial finding that the Employee's PTD and SSDI benefits as of August 24, 2003 were "occasioned by" the same disabling condition. Not only did the WCCA exceed its appellate review by ruling that the Compensation Judge's factual findings were not substantially supported in the record, its own substituted factual findings are clearly erroneous, in that they omit these important facts on the record.

The WCCA also erred in interpreting and applying the law to reverse the Compensation Judge's ruling on the SSDI offset. First, the WCCA's decision seems to impose a standard that the employee's work injury has to be the primary cause of the employee's receipt of SSDI benefits for the offset to apply. The decision also implies that the Compensation Judge can only consider the evidence relating to the employee's initial award of SSDI benefits in determining if the offset applies. Finally, the WCCA appears to be stating that, as a matter of law, SSDI benefits awarded prior to the date of a work injury cannot be "occasioned by" the same disabling condition as the work injury. The Employer respectfully submits that the WCCA has misinterpreted the statute in this regard.

Minn. Stat. 176.101, Subd. 4 allows for an offset of SSDI benefits when those benefits are "occasioned by the same injury or injuries which give rise to" the PTD benefits. Minn. Stat. 176.101, subd. 4 (2000). Under well known canons of statutory construction, this Court must give full effect to the plain meaning of the statute. Minn. Stat. 645.16 (2000), McClish, 336 N.W.2d at 542-43. Furthermore, when there is no prior case law on the interpretation of the statute, this Court must "discern and implement

the intent of the legislature” in interpreting the statute. Id. In this instance, there is nothing in the plain meaning of this statutory language that requires the WCCA’s interpretation of the statute and its’ interpretation is contrary to the discernible intent of the legislature.

There is nothing in the express language of the statute or the phrase “occasioned by” that requires that the work injury be the primary cause of the receipt of SSDI benefits. In fact, the WCCA has recently held that the work injury need not be the sole factor in the award of SSDI benefits if, instead, it is a “substantial contributing factor.” Fletcher v. Todd County, 2004 WL 886837 (MN Workers’ Compensation Court of Appeals, March 23, 2004) (employee was awarded PTD benefits on the basis of a low back work injury and the employer was allowed to offset SSDI benefits awarded where the primary diagnosis for SSDI purposes was regarding the employee’s knees and the secondary diagnosis was regarding the low back). Thus, the Employee’s testimony at the social security proceeding that her chronic pain syndrome included low back pain and that her back pain was one of the reasons she cited in her testimony as to why she had to stop working in 1997 should be considered in light of this legal standard, and not whether the Employee’s low back condition was the primary cause for the award of SSDI benefits.

Second, there is no express language in the statute requiring that the Compensation Judge is limited to only considering the basis for the initial award of SSDI benefits when, as here, the SSDI benefits are awarded prior to the work injury. The statute reads that both benefits must be “occasioned by” the same disabling injury which,

in fact, necessarily implies that this analysis must be made at the time both benefits are being paid. The WCCA seems to take the position that the Compensation Judge was limited in reviewing the basis for the Employee's receipt of SSDI benefits as of August 24, 2003, to the basis for the initial award in 1999. Instead, both the Compensation Judge and the WCCA were required to make this analysis as of when the benefits were both being paid; in this case, August 24, 2003 and thereafter.

Certainly, the factual record in this case could contain more evidence regarding the basis for the Employee's receipt of SSDI benefits as of August 24, 2003, including the renewal date and basis for that decision. But there is, nonetheless, significant and sufficient evidence in the record indicating that the Employee's low back condition was a substantial contributing cause in the award of the SSDI benefits after August 24, 2003. First and foremost is the Employee's own testimony that, as of that date, her primary disabling condition with respect to both the workers' compensation and SSDI benefits was her low back condition. Assuming the Employee testified truthfully and would also have made truthful representations to social security regarding her SSDI benefits – and there is no reason to assume otherwise – this is, in fact, the most compelling evidence possible that her benefits as of that date were “occasioned by” the same disabling condition, regardless of what may have been the case at the time of the initial award in 1999 or at any subsequent renewal. The fact that SSDI benefits are periodically reviewed and renewed also suggests that the basis for those awards is subject to change, based on the recipient's changing condition as it impacts on their ability to work.

Finally, the WCCA seems to state that, as a matter of law, the Employee's SSDI benefits could not be "occasioned by" the same disabling condition as the work injury when those benefits are awarded prior to the work injury. Apart from the discussion above, this analysis is also fundamentally flawed in those instances, such as here, where the employee's work injury is determined to be, not a new injury, but a permanent aggravation of a pre-existing condition. The Compensation Judge clearly held that the Employee's August 24, 2003 work injury that entitled her to wage loss benefits was a permanent aggravation of her pre-existing low back condition. An employer may be liable for workers' compensation benefits as a result of a permanent aggravation of a pre-existing condition, but this does not change the fact the work injury is part of a pre-existing condition for the purposes of interpreting the SSDI offset provisions of the statute.

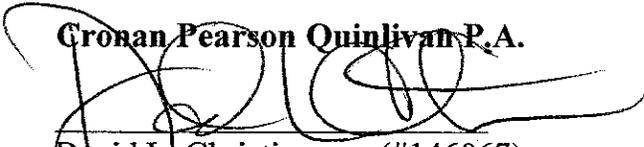
The WCCA's interpretation of the "occasioned by" provision of the SSDI offset is neither required by the plain language of the statute nor consistent with the underlying principles of the workers' compensation system. It is the clear intent of the SSDI offset provisions of the workers' compensation statute that an Employee's PTD and SSDI benefits work together to replace an employee's disability-related wage loss, but not to provide a duplication of benefits and a windfall to the employee. Sundby, 693 N.W.2d at 210-11. This Court should reject the WCCA's interpretation and application of the statute in this manner and in this case.

CONCLUSION

The WCCA's affirmance of the Compensation Judge's decision that the Employee's work injury rendered her permanently totally disabled is manifestly in error where, as here, neither the Compensation Judge nor the WCCA properly considered the effect of the Employee's receipt of SSDI benefits and how this limited her earning capacity in this case. The Employer respectfully requests this Court to reverse this decision and provide guidance to the WCCA on the appropriate analysis of this issue.

The Employer alternatively requests that this Court reverse the decision of the WCCA overturning the Compensation Judge's decision that the Employee's permanent total disability benefits were "occasioned by " in substantial part by the same disabling condition for her SSDI benefits and, therefore, the Employer was entitled to offset payment of the SSDI benefits, as this decision by the WCCA exceeded its appellate authority and misinterpreted the relevant statutory language in light of the underlying principles of the workers' compensation system.

Dated: June 6, 2007


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No. A07-932
STATE OF MINNESOTA
IN SUPREME COURT

Mary R. Olds,

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vs.

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Relator,

and

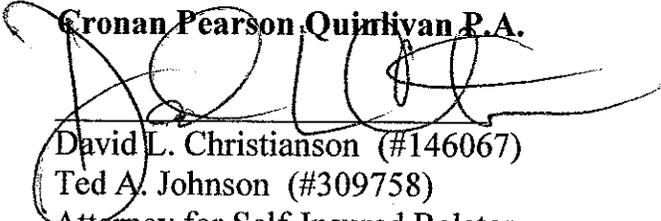
Twin Cities Spine Center

Intervenors.

CERTIFICATION OF BREIF LENGTH

I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a proportional font. The length of this brief is 574 lines and 7,194 words. This brief was prepared using Microsoft Word Office 2003.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).