

CHARLES CIKANEK, Employee/Cross-Appellant, v. CIKANEK BUILDERS, INC. and AMERICAN MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 14, 1988

No. ###-##-#### **[REDACTED TO REMOVE SSN]**

Determined by Rieke, C.J., Cervantes, J., and Pranke, J.
Compensation Judge: Thomas W. Walsh

Affirmed in part and reversed in part.

OPINION

MANUEL J. CERVANTES, Judge

At trial the compensation judge found that as a result of employee's personal injuries on December 26, 1983 and January 17, 1984, employee was temporarily totally disabled from January 1 through January 31, 1985 and temporarily partially disabled from February 1, 1985 to the date of hearing and continuing. In awarding temporary partial disability benefits, the compensation judge determined employee had an average weekly wage on the dates of injury of \$910.00, and that employee's post-injury earning capacity was reflected in his actual earnings since February 1, 1985. Lastly, the compensation judge found that as a result of employee's December 26, 1983 injury to his neck and upper back, he sustained a 10% permanent partial disability to the back, and as a result of his January 17, 1984 injury to his low back, he suffered an 8% permanent partial disability to the body as a whole.

Employer and insurer appeal the decision of the compensation judge awarding employee temporary and permanent partial disability benefits. The employee brings a cross-appeal on the issue of the calculation of his average weekly wage on the dates of injury. We affirm in part and reverse in part.

Employee, age 38, has worked as a carpenter most of his adult life. In 1975 he went into business as Cikanek Builders, Incorporated. Employee is the sole shareholder. The corporation first hired employees in 1980, primarily sub-contractors. Cikanek Builders were in the business of constructing residential homes. Employee's duties consisted of manual labor, rough carpentry work, framing and siding houses as well as bookkeeping.

Employee Is Temporarily and Permanently Disabled as a Result of the December 26, 1983 and January 17, 1984 Work-related Injuries

We find substantial support in the record for the compensation judge's determination that the employee was disabled as a result of his 1983 and 1984 work-related injuries despite employer and insurer's assertion that employee's disability is the result of his 1980 low

back injury, pre-existing neck problems, and psychological problems. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235 (Minn. 1984).

Employee sustained a work-related injury to his low back in January of 1980. He entered into a full and final settlement with the insurer on the risk at the time, Fidelity and Casualty Insurance Company (Fidelity). The insurer paid employee benefits representing a 10% permanent partial disability of the spine pursuant to an award on stipulation.

After his 1980 injury, employee treated with his chiropractors: Dr. Behm and Dr. Lundgren. Dr. Behm diagnosed employee's condition as "chronic unresolved lumbar-sacral strain." Dr. Lundgren felt employee suffered from mechanical low back pain.

Employee also saw Dr. Ray for a neurological evaluation. He opined employee's X-rays showed he had "sixth lumbar vertebrae, narrowing between the L6/S1 space, slight asymmetry of the L5/L6 facets at L6/S1. The CT scan revealed facet hypertrophy, bilateral stenosis at L5/L6 and L4/L5, and mild central stenosis at L3/L4. Dr. Ray opined employee suffered from mechanical back strain with facet joint syndrome and bilateral lateral stenosis at L5/L6 on the right.

Employee underwent a facet nerve block in June of 1980. He testified that after a healing period his back "did get considerably better." Employee still experienced pain in the very low part of his back on the right side radiating slightly into his right leg. He rated this pain as three on a scale of one to ten. Employee testified that after the 1980 injury, he was able to return to taking on a heavy work schedule, performing most phases of carpentry work.

Following his 1980 injury, employee treated with doctors at the Park Nicollet Clinic for depression. (See office notes of Dr. Lundgren dated September 17 and October 8, 1980; Dr. Lynch dated October 1, and October 18, 1981; and Dr. Lano dated December 30, 1983.) Treatment for depression lasted a couple of years. Employee testified he took Sinequan for depression but later it was prescribed by Dr. Lano for his headaches. Employee had suffered from headaches prior to his 1983 work-related injury. (See also Dr. Juola's office note dated February 27, 1981.)

Employee testified, and Dr. Behm's records indicate, employee treated with Dr. Behm for neck stiffness from July to December of 1983. Dr. Behm's office note of December 23, 1983 states employee was "feeling better."

On December 26, 1983, employee sustained a second work-related injury while self-employed. He slipped on the deck of a house he was building falling seven feet to the ground landing on the right side of his head, neck, and shoulder. Employer and insurer, American Mutual Insurance Company (American Mutual), accepted liability.

Employee saw Dr. Behm for this injury in January, 1984. Employee had muscle inflammation, stiffness, and decreased lateral range of motion in the cervical area. Dr. Behm diagnosed employee's condition as a chronic cervical/dorsal strain. Employee's treatment with Dr. Behm increased in June of 1984 as employee began experiencing headaches which Dr. Behm felt were secondary to his cervical strain. Employee continued to treat with her until the date of hearing. In addition, employee treated with other doctors in 1985 and 1986 for upper back and neck pain.

Dr. Behm referred employee to another neurologist, Dr. Lebow, in May of 1984. He opined employee suffered from a cervical strain but that the CT scan he ordered showed employee's neck was "fine." Dr. Lebow felt employee was "somatically occupied."

Employee was referred to Dr. Hammond, a chiropractor, in November of 1985. He found limitation in cervical motion and tenderness to palpitation. He diagnosed employee's condition as "headaches, cervical myalgias." Dr. Hammond opined that employee sustained a permanent injury to his cervical spine as a result of the December 26, 1983 injury.

On January 17, 1984, employee sustained a third work-related injury while self-employed. He fell four feet from scaffolding to the frozen ground landing on his heels and injuring his low back. Employer and insurer accepted liability and paid employee impairment compensation representing 7% permanent partial disability to the body as a whole.

Employee also treated with Dr. Behm for this injury. He had some limitation in range of motion on straight leg raising. Dr. Behm initially diagnosed his condition as lumbar strain. In July of 1985, she opined employee suffered from "acute lumbar strain associated with mechanical back pain syndrome." In December of 1985, employee continued to complain to Dr. Behm of low back and left leg pain and evinced poor range of motion. She opined employee's lumbar strain was caused by the January 17, 1984 injury.

When examined by Dr. Lebow, employee complained of low back pain radiating down both legs, more on the right side. Dr. Lebow found good mobility of the low back. He diagnosed employee's condition as "very chronic muscle strain." Dr. Lebow reported the new CT scan showed a definite bulging disc on the right at L6/S1, and, in contrast to the findings of Dr. Ray, opined that this was apparent on the 1980 CT scan.

When examined by Dr. Hammond, employee exhibited tenderness to palpitation, tension on straight leg raising, and limited lumbar motion. Dr. Hammond read the new CT scan as indicating a "L6 deformity with a disc bulge to the right compressing the S1 nerve." Dr. Hammond opined employee's January 17, 1984 injury caused a temporary aggravation to his pre-existing low back condition.

Dr. Behm opined employee could not physically withstand the job of carpenter/residential construction, since the work required bending, twisting, lifting rafters and

walls, and working overhead. Employee was advised to find other work. Dr. Hammond also recommended that employee should avoid repetitious bending, heavy lifting, and overhead work. He felt both the 1983 and 1984 injuries might have resulted in a brief period of temporary total disability. Dr. Lebow opined these work-related injuries would not materially affect employee's ability to continue performing his carpentry job.

Employee missed little or no time from work as a result of his 1983 and 1984 injuries. Employee testified, however, that he performed his carpentry duties in 1984 in a "great deal of pain and frustration" and that the only reason he continued to work as a carpenter was because he "didn't know how to make a living at anything else." Employee stated he had a very difficult time using his hammer and experienced pain in his shoulder, neck, right arm and headaches while working. He further testified his headaches were worse when working overhead or hammering. Working overhead was very difficult. He also had trouble using a saw. Employee testified that any physical work, particularly lifting and bending, aggravated his low back pain. Employee discontinued his self-employment with Cikanek Builders in December of 1984. The reason he quit, employee testified, was that his ability to do the carpentry work kept decreasing and his level of pain from doing the work kept increasing.

Employee stated he indeed had headaches prior to his 1983 injury, but never to the extreme he experienced after his injuries. He testified his neck and upper back pain often caused headaches. He characterized his neck and upper back pain as five to nine on a scale of ten. Employee described his low back pain after his injuries as five to seven on a scale of ten. He testified he had very minimal pain in his left leg, if at all prior to his 1984 injury, but since then has had pain in both legs.

The compensation judge's determination that employee was temporarily and permanently disabled as a result of his 1983 and 1984 injuries is amply supported by employee's testimony, the opinions of Dr. Behm and Dr. Hammond, the medical records, and objective evidence in the form of a post-injury CT scan require that we affirm.

Employee Is Entitled to Temporary Benefits

Temporary Total Disability

Cikanek Builders did a fair amount of work for Laurent Builders as a sub-contractor. In November of 1984 employee discussed with Laurent Builders the possibility of being hired with that company as a supervisor. Laurent Builders agreed to hire employee, but stated a position would not be available until February of 1985. Employee testified he did not do any work for Cikanek Builders in January of 1985 and waited for Laurent Builders to hire him. Employee began working for Laurent Builders on February 1, 1985.

The compensation judge reasonably concluded employee is entitled to temporary total disability benefits for the month of January, 1985. Employee suffered low back pain as a

result of his January 17, 1984 work-related injury which substantially contributed to his inability to work. Prior to even being served with the maximum medical improvement report in March, 1985 the employee became medically unable to continue his job. The employee is entitled to temporary total disability for the period that he was not working because he quit Cikanek Builders as he was medically unable to continue.

Temporary Partial Disability

Employee argues the compensation judge erred in calculating his average weekly wage. Employer and insurer argue that even if employee is temporarily partially disabled, his post-injury wage should have been based on his 1984 earnings. We do not agree with either argument.

Average Weekly Wage

Cikanek Builders paid a total of \$44,350.00 in (gross) compensation to employee in 1983. These payments were made monthly from August to December of 1983. Cikanek Builders had a taxable income of \$2,987.00 in 1983. The certified public accountant who testified on behalf of employer and insurer said that in determining employee's combined total earnings from the construction trade in 1983, he added the corporation's taxable income to the amount of compensation the corporation paid to employee and deducted on its income tax returns. Using this formula, employee's total earnings in 1983 were \$47,337.00. This amount represented earnings for work performed throughout the entire year. The certified public accountant divided this sum by 52 weeks to ascertain that employee's average weekly wage in 1983 was \$910.00. In 1984, employee's combined total earnings were \$47,806.00. Under this formula, the certified public accountant determined employee's average weekly wage in 1984 was \$919.00. This provides a substantial evidentiary basis upon which we must affirm. Hengemuhle, supra.

Employee asserts his average weekly wage was difficult to determine and that the compensation judge erred in not dividing employee's yearly income by 26 pursuant to Minn. Stat. § 176.011, subd. 3 (1984). This method of calculation would result in an average weekly wage of \$1,673.08. Employee also argues that since he was paid in 1984 for work done in 1983, this income should also be included in calculating his average weekly wage. Finally, employee contends that monies paid by Cikanek Builders to the Carpenters and Joiners Fringe Fund for employee's pension, vacation, and health and welfare benefits should be included in calculating his average weekly wage.

The compensation judge reasonably concluded employee's average weekly wage on December 26, 1983 and January 17, 1984 was \$910.00. Minn. Stat. § 176.011, subd. 3 (1984) provides in part that if the amount of the daily wage received or to be received by the employee at the time of injury was irregular or difficult to determine, the weekly wage shall be computed by dividing the total amount the employee actually earned in the last 26 weeks by the total number of days in which the employee actually performed the duties of his employment. The fact that

employee's compensation was received solely in the second half of 1983 does not mean his average weekly wage was difficult to determine. Employee's yearly income and thus average weekly wage were readily ascertainable from income tax records and Cikanek Builders check register. Employee's income was not irregular, as evidenced by the fact employee's earnings in 1983 and 1984 were about the same. Minn. Stat. § 176.011, subd. 3 (1984) is therefore inapplicable.

As employee did not demonstrate how much Cikanek Builders received in 1984 for work completed in 1983, the compensation judge had no basis on which to increase employee's average weekly wage to reflect those additional earnings.

Lastly, the compensation judge did not err in concluding that contributions by Cikanek Builders on behalf of employee to the Carpenters and Joiners Fringe Fund (\$3,475.20 in 1983) should not be included in calculating employee's average weekly wage. Upon review, it is clear that employee failed to demonstrate that these benefits were allowances under Minn. Stat. § 176.011, subd. 3 (1984). Furthermore, the certified public accountant did not include these benefits in determining employee's combined total earnings. Thus, there is substantial evidence to affirm the compensation judge's determination. Hengemuhle, supra.

Earning Capacity

The compensation judge reasonably determined that employee's 1984 earnings, while self-employed with Cikanek Builders, do not correctly reflect employee's actual ability to earn since February 1, 1985. The Minnesota Supreme Court has held that actual, concrete evidence of earnings creates a presumption of earning capacity. Owens v. Pako Corp., 386 N.W.2d 711, 38 W.C.D. 627 (Minn. 1986); Mathiason v. Thermal Co., Inc., 308 Minn. 471, 243 N.W.2d 110, 28 W.C.D. 406 (1976). The presumption, however, may be rebutted with facts showing that actual earnings are an unreliable measure of earning capacity. Mitchell v. White Castle Systems, Inc., 290 N.W.2d 753, 32 W.C.D. 288 (Minn. 1980). As employee was physically unable to continue work as a self-employed carpenter his earnings in 1984 are an unreliable measure of his post-injury earning capacity.

Employee continued to work as a carpenter for Cikanek Builders in 1984 after his injuries, earning slightly more than he did in 1983. Yet, as previously discussed, employee found it more and more difficult to perform the tasks demanded by the job. He eventually obtained a job with Laurent Builders earning \$12.00 an hour and \$18.00 an hour for overtime. This job was considerably lighter work. Employee testified that he works as a supervisor, overseeing the building of new homes and dealing with customers. He stated about 5% to 10% of the job involves manual labor such as "laying out" markings or running errands for materials. Employee testified he was capable of performing the supervisory and administrative duties with Laurent Builders.

It is apparent that this job with Laurent Builders is within his restrictions, thus we believe these earnings more accurately reflect his earning capacity for the purposes of calculating temporary partial disability benefits.

Permanent Partial Disability

The compensation judge's determination that employee sustained a 10% permanent partial disability to the back as a result of his December 26, 1983 upper back and neck injury is supported by such evidence that, viewing the record as a whole, reasonable minds would accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d at 59. However, the compensation judge's finding that employee sustained an 8% permanent partial disability to the body as a whole as a result of his January 17, 1984 low back injury lacks substantial support in the record and is hereby reversed. Id.

1983 Cervical Injury

Dr. Hammond believed employee suffered a 10% permanent partial disability of the cervical spine as a result of the 1983 injury. The compensation judge concurred with this opinion. Dr. Behm initially opined in March of 1985 that employee's cervical strain had healed and did not render a permanency rating. In September of 1986, Dr. Behm felt employee sustained a 7.4% permanent partial disability to the cervical spine "due to chronic headaches of moderate severity involving the greater occipital nerves." Dr. Schloff, the adverse examiner, reported he could find no permanent disability as a result of employee's 1983 injury.

A trier of fact's choice between experts whose testimony conflicts should be upheld unless the expert assumed facts not supported by the evidence in rendering his opinion. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). Dr. Hammond, in issuing his lengthy and detailed report, relied on employee's history, an examination, and Dr. Behm's and Dr. Lebow's medical records. Dr. Hammond's opinion rested on adequate foundation. The compensation judge's choice between experts thus must be upheld.

1984 Low Back Injury

Dr. Schloff felt employee sustained a 14% permanent partial disability to the body as a whole as a result of his 1980 and 1984 injuries to his low back. Dr. Schloff attributed one-half of the permanency to each of these injuries. The compensation judge agreed with Dr. Schloff's assessment. Dr. Behm also opined employee sustained a 14% permanent partial disability to the body as a whole as a result of his low back injuries, but attributed only 25% of the permanency to employee's 1984 injury. Dr. Hammond believed the 1984 injury temporarily aggravated employee's pre-existing low back condition, and thus found the injury did not result in any permanency. In light of Nord, supra, we uphold the compensation judge's choice between conflicting expert opinions.

The compensation judge, however, awarded employee 8% permanent partial disability to the body as a whole as against American Mutual since Fidelity paid employee compensation which converts to 6% to the body as a whole. The compensation judge should have awarded 7% permanent partial disability to the body as a whole as he agreed with Dr. Schloff's 50-50 split on apportionment. Employee settled his claim for permanent partial disability relating to his 1980 injury. American Mutual should not have to compensate employee for permanency which the compensation judge finds is attributable to a pre-existing condition. We therefore reverse the compensation judge's award of 8% permanent partial disability and substitute an award of 7%.

Economic Recovery Compensation

The compensation judge did not err in awarding permanency to employee's 1984 injury as economic recovery compensation. Employee's position with Laurent Builders cannot be characterized as a 3e job pursuant to Minn. Stat. § 176.101, subd. 3e(b) (1984) as that job did not produce an economic status as close as possible to that which the employee would have enjoyed without his disability. The Laurent Builders job, on the other hand, does fall within the scope of Minn. Stat. § 176.101, subd. 3f (1984) as the work is within employee's physical limitations. Pursuant to this subdivision and Minn. Stat. § 176.101, subd. 3p (1984), employee is entitled to economic recovery compensation since he did not receive a job offer meeting the criteria of subdivision 3e within 90 days after reaching maximum medical improvement.