[Redacted to remove Social Security Number.]

ARTHUR A. AHLSTROM, Employee/Appellant v. POLKA DOT DAIRY and HOME INS. CO., Employer-Insurer/Cross-Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 9, 1990

No. [Redacted to remove SSN.]

Determined by SHIMON, J., RIEKE, C.J., and TOUSSAINT, J.
Compensation Judge: Bradley J. Behr.

Affirmed in part and reversed and remanded in part.

OPINION

EDWARD TOUSSAINT, Judge

Employer appeals several findings related to the award of temporary partial disability benefits, including whether employee's claim for temporary partial disability was properly before the compensation judge at the expedited discontinuance hearing. Both parties appeal the compensation judge's calculation of employee's post-injury earning capacity. We affirm in part and reverse and remand in part.

BACKGROUND

On March 15, 1988, employee sustained an injury to his low back while working as a route driver for employer. Employee was delivering a cart of ice cream weighing between 500 and 700 pounds, when he stepped off the side of the ramp twisting his back. Employer accepted liability for employee's injury and paid all medical expenses prior to May 1989. Employee did not lose time from work until May 3, 1989, when he stopped working at the route driver job. Employee testified that he stopped working at this job because of severe pain. On May 25, 1989, employee saw his treating chiropractor, Dr. Joel Branes, who recommended that employee stay off the route driving job for six weeks and avoid heavy lifting. Employer paid temporary total disability benefits to employee and appointed a QRC to provide rehabilitation.

Employee has also been self-employed in a sideline landscaping business since approximately 1980. Employee grows and sells trees along with black dirt and gravel. He owns several pieces of equipment and, at times, employs helpers or subcontracts work to other landscapers.

On August 15, 1989, employer filed a Notice of Intention to Discontinue temporary total disability benefits alleging that, based on investigation, employee was earning income

through self-employment and, as such, was no longer temporarily totally disabled. Employee requested an administrative conference pursuant to Minn. Stat. § 176.239. In a decision filed September 15, 1989, the rehabilitation and medical specialist determined that reasonable grounds existed to discontinue employee's temporary total disability benefits based on employee's self-employment as a landscape contractor. Employee filed an objection to discontinuance on September 20, 1989, claiming entitlement to temporary partial disability benefits from August 29, 1989. The matter was scheduled for an expedited hearing on October 31, 1989, pursuant to Minn. Stat. § 176.238, subd. 6 (1988). On October 27, 1989, employer filed a motion to dismiss arguing that because temporary partial disability had not been in issue at the 176.239 conference, it was not entitled to expedited status. Judge Walraff denied the motion for dismissal by order dated October 31, 1989.

In his decision issued on December 18, 1989, the compensation judge determined that employee sustained a loss of earnings and earning capacity and was temporarily partially disabled from May 3, 1989, to the date of the hearing as a substantial result of the March 15, 1988 injury. The compensation judge further determined that from May 3, 1989, to the date of the hearing, employee earned $4,769.00 through self-employment, and that this figure was an accurate reflection of his earning capacity during this period. Both parties appeal.

SCOPE OF EXPEDITED HEARING

At the hearing before the compensation judge, employer again objected to consideration of employee's temporary partial disability claim and requested that the matter be placed on a regular calendar to allow for adequate discovery. The compensation judge did not grant employer's request but did indicate that he would keep the record open for 30 days after the hearing to allow employer further discovery, specifically with regard to employee's post-injury earnings. Furthermore, the compensation judge indicated that should either party need time beyond the 30 days post-hearing, such a request could be directed to Judge Walraff. As neither party made such a request the record closed in this matter on November 30, 1989. Employer now appeals this issue contending that because temporary partial disability had not been in issue at the 176.239 conference, the compensation judge improperly considered employee's temporary partial disability claim at the expedited hearing. We disagree.

"Consideration of an employee's temporary partial compensation claim is not an improper expansion of issues in contravention of Minn. Stat. § 176.238, subd. 6, where temporary total compensation has been discontinued based on the employee's return to work." Reid v. Ryder Truck Rental, 42 W.C.D. 677 (W.C.C.A. 1989). See also Meline v. Tekcom, Inc., 41 W.C.D. 52 (W.C.C.A. 1988); Violette v. Midwest Printing Co., 415 N.W.2d 318, 40 W.C.D. 445 (Minn. 1987). "Minn. Stat. § 176.238 establishes an expedited procedure for the resolution of disputes regarding entitlement to ongoing weekly benefits, including both temporary total and temporary partial compensation. To discontinue temporary total benefits without consideration

of temporary partial benefits, where an employee has returned to work, frustrates the intent of the statute." Reid, id.

Employee's objection to discontinuance of benefits placed employer on notice of employee's temporary partial disability claim. Furthermore, employer's notice of intention to discontinue benefits cited employee's self-employment as the reason for the intended discontinuance. Employer was provided with 30 days following the hearing to allow for further discovery and, in fact, did so engage. As such, we are of the opinion that employer was not prejudiced by the compensation judge's consideration of employee's claim for temporary partial disability benefits at the expedited hearing.

ENTITLEMENT TO TEMPORARY PARTIAL DISABILITY BENEFITS

The compensation judge determined that employee was entitled to temporary partial disability benefits from May 3, 1989, to the date of the hearing based on the following relevant findings: employee continued to experience low back pain with leg pain from March 15, 1988, to May 3, 1989; employee stopped working at the route driver job because of severe pain; from May 3, 1989, to the date of the hearing employee continued his self-employment in the landscaping business but did not perform heavy lifting, and attempted to limit standing and walking; from May 3, 1989, to the date of the hearing employee cooperated with rehabilitation and was available for work search and/or job placement; employee's QRC did not request a job search; employee did not remove himself from the labor market nor permanently retire from his route driver position; employee was a credible witness.

Employer appeals asserting that employee was not credible, did not cooperate with rehabilitation, removed himself from the labor market, voluntarily quit the route driver position, and that employee's self-employment exceeded his restrictions.

Employer argues initially that the compensation judge incorrectly found employee to be credible when employee failed to inform either his QRC or examining doctors that he was self-employed. Employer contends that this lack of candor resulted in a lack of cooperation with rehabilitation, and that by not disclosing this information employee may have foreclosed a rehabilitation plan that was successful for him.

In the memorandum supporting his findings, the compensation judge agreed that employee was less than candid with his QRC and examining physicians regarding his self-employment but went on to conclude that this lack of candor had no practical effect on employee's claim. Employee was first contacted by a QRC intern on May 24, 1989. Rehabilitation during the summer of 1989 for the most part consisted of medical monitoring. Dr. Branes completed an R-33 on June 21, 1989, which allowed employee to return to a light duty job. The QRC conceded that no jobs were offered to employee, nor was he asked to initiate a job search. The QRC further testified that employee was cooperative regarding his rehabilitation and at no point indicated that

he was unavailable for a work search. Based on these facts, the compensation judge could reasonably conclude that employee cooperated with rehabilitation and did not remove himself from the labor market.

Employer's contention that employee voluntarily quit his truck driver position is based primarily on the fact that employee did not seek treatment with Dr. Branes until approximately three weeks after quitting the route driver position on May 3, 1989. The compensation judge, however, determined that employee suffered from a significant low back disability and quit the job because of severe pain. Employee's medical history indicates that he sought treatment two days after his March 15, 1988, work-injury. After examination and x-ray, employee's condition was diagnosed as a grade one spondylolisthesis. Employee underwent a CT scan on August 8, 1988, which revealed spondylolysis at the L4-5 level and severe degenerative disc disease at L5-S1. The record indicates that prior to his work injury of March 15, 1988, employee had no lower back problems. Subsequent to the March 15, 1988 injury, employee testified that he continued to have symptoms but was able to continue working at the route driver job by reducing his hours somewhat and because ice cream sales were down during the winter months. Employee further testified that by early May 1989 his back pain increased to the extent that he was unable to perform the heavy lifting, pushing, and pulling required by his route driver job. On May 25, 1989, he saw his chiropractor, Dr. Branes, who recommended that employee stay off his route driver job for six weeks and to avoid heavy lifting.

At employer's request, employee was examined by Dr. Clyde Warner, an orthopedist, on July 5, 1989. Upon review of the route driver job as set forth in a job analysis, Dr. Warner did not believe employee was capable of returning to his route driver position. Employee was examined by Dr. Paul Cederberg on September 26, 1989, who recommended that employee undergo a fusion and laminectomy. In Dr. Cederberg's opinion, employee could not return to his previous route driving job and imposed restrictions of no lifting over 20 pounds on a repetitive basis and to limit standing. Based on the opinions of Drs. Warner and Cederberg, the work restrictions imposed, as well as employee's testimony, there is substantial evidence to support the compensation judge's determination that employee was unable to continue the route driver position because of his March 15, 1988, work injury.[1]

Employer next contends that employee's work as a self-employed landscaper exceeded his restrictions and that employee lacked candor with Dr. Branes by leaving his doctor with the impression that the self-employment was basically phone work. On June 21, 1989, Dr. Branes restricted employee to no standing greater than five minutes, no walking greater than 15 minutes, and no pushing, pulling, lifting or carrying greater than 75 pounds. Employer claims that employee's self-employment required him to violate his restriction regarding standing as indicated by a video surveillance offered into evidence by employer.

[1] Given employee's restrictions and the opinions of the examining doctors, employer's argument that employee permanently retired from the truck driver position also fails.

The compensation judge did not accept the video tape as probative of a significant violation of employee's restrictions. It was Dr. Branes' deposition testimony that the route driver position was inappropriate because of the heaving lifting involved. Employee testified that he tried to limit his lifting and heavy labor in his landscaping business after May 3, 1989, other than some short term driving and some operating of equipment.

Employee's assertion as to the extent of his disability is questionable in light of the video tape. Although a contrary conclusion could be drawn, we decline to do so. On numerous occasions the Minnesota Supreme Court has stated that assessment of the credibility of a witness is the unique function of the trier of fact. Therefore, we accept the compensation judge's credibility assessment. Dille v. Knox Lumber, Minnesota Supreme Court, March 16, 1990; Tolzmann v. McCombs-Knutson Associates, 447 N.W.2d 196, 42 W.C.D. 421 (Minn. 1989); Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). Where the evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Viewing the record as a whole, we conclude that the evidence is adequate to support the compensation judge's ultimate determination that reasonable grounds did not exist to discontinue employee's temporary disability compensation except as necessary to reduce temporary total benefits to temporary partial benefits. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984).

POST-INJURY EARNING CAPACITY

As evidence of his post-injury earning capacity, employee offered income tax returns for 1987 and 1988, receipts from his landscaping business, a checkbook ledger with intermingled personal and business expenses, the testimony of his accountant, John Reuter, and a statement of revenues and expenses for January through August 1989 prepared by Mr. Reuter. The compensation judge calculated employee's post-injury earnings by adding the receipts from the landscaping business for the period May 1, 1989, to October 31, 1989, less operating expenses and costs of goods but disallowing a reduction for depreciation. Using this equation, the compensation judge determined that employee's actual earnings from May 3, 1989, to October 31, 1989, were $4,769.00, and that this was an accurate reflection of employee's earning capacity for this period. Both parties appeal.

Employer contends that under Edelman v. Thorson Construction, Inc., 37 W.C.D. 19 (W.C.C.A. 1984), income tax returns may not be used to calculate self-employment income unless there is a showing that the income tax returns represent evidence of earning capacity. We do not accept this argument because the compensation judge did not use the income tax returns to calculate employee's post-injury earning capacity. In his memorandum, the compensation judge indicated that he relied primarily upon the business receipts, the checkbook ledger, and testimony of employee's accountant. Furthermore, the compensation judge calculated employee's post-

injury earning capacity for a six-month period in 1989 whereas the income tax returns were for 1987 and 1988.

Post-injury wages create a presumption of earning capacity which can be rebutted by evidence that employee's ability to earn is different than the post-injury wage. Einberger v. 3M Company, 41 W.C.D. 727 (W.C.C.A. 1989). What an employee is able to earn in his partially disabled condition is a question of fact. Einberger, id. The compensation judge's reliance on the business receipts, checkbook ledger, and testimony of employee's accountant to determine employee's post-injury earnings was reasonable under the circumstances: employee's self-employment was a small seasonal sideline business with informal records of transactions.

This court has previously indicated that in order to establish an earning capacity different from the employee's actual wages, an employer must show something more than a theoretical possibility of a position or wage. See Einberger, id., at ftnt. 14; Serra v. Hanna Mining Company (W.C.C.A., Feb. 2, 1989). Because there is insufficient evidence to rebut the compensation judge's post injury wage determination, we affirm.

DEPRECIATION DEDUCTION

We do not believe, however, that the compensation judge properly disallowed a depreciation deduction. The compensation judge cited Backaus v. Murphy Motor Freight Lines, 422 N.W.2d 326, 42 W.C.D. 24 (Minn. 1989), for the proposition that costs related to the acquisition or depreciation of capital assets are not properly deductible from gross income in determining employee's weekly wage from self-employment. We do not read Backaus this way. In Backaus, the employee entered into a lease agreement with his employer wherein employee agreed to lease his truck to employer in return for which employee received a percentage of the revenue earned through the use of the equipment. Employee also drove the rig for which he received a separate wage. The issue was whether the income received pursuant to the lease agreement should be included in the calculation of employee's weekly wage at the time of the injury. The supreme court did not permit the income from employee's capital investment to be included in his date of injury wage on the rationale that had the employee retained ownership of the truck subsequent to his injury, he could have engaged a driver and continued to realize the same return on his investment despite his inability to contribute his labor to the enterprise.

We believe the facts in the present case are distinguishable. Over the course of several years, employee purchased a bobcat, a bulldozer, two dump trucks, a cat and tree spade. These are the tools of his landscaping business. They were not leased to a third party, as in Backaus, to generate income. If employee were to rent landscaping equipment from a third party to run his landscaping business, the rental costs would be deductible from gross earnings as an operating expense. We see no reason to treat an owner of equipment in a self-employment situation differently from one who leases that same equipment.

In Hamilton v. GMW Trucking, 42 W.C.D. 257 (W.C.C.A. 1989), a case similar to the present case, this court remanded for a recalculation of employee's post-injury earnings with instructions to allow a depreciation deduction on equipment purchased by employee for use in his self-employment. In Hamilton we stated, "[w]hile it may be less than precisely accurate, we believe the Internal Revenue Service method of spreading the cost of the item over the anticipated useful life of that item and allowing the employee-business owner to depreciate the item, i.e., spread his cost over that useful life, is the most realistic way of arriving at the employee's actual earnings."

We therefore remand for a recalculation of employee's post-injury earnings to include a depreciation deduction in accord with Hamilton. The compensation judge may, in his discretion, take further evidence for this purpose.

Employee last argues that, to accurately measure his post-injury earnings, one must look at his earnings for all the months in 1989. Employee, however, is claiming temporary benefits from May 3, 1989, to the date of the hearing. Because employee did not sustain a loss of earnings prior to May 3, 1989, the compensation judge properly did not consider that period of time.