RAFAEL BERDUGO, Employee, v. AER SERV., INC. and HARTFORD INS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 19, 1998

HEADNOTES

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee testified as to his work history and wages and produced a tax return and payment records in accord, and gave an explanation for differences between his pay records and checking account deposit records, the compensation judge was supported by substantial evidence in awarding temporary partial disability benefits based on the employee's actual reported earnings.

PRACTICE & PROCEDURE - CONTINUATION OF HEARING. Where the compensation judge found that the employee had substantially complied with the employer and insurer's discovery demand for financial records, the compensation judge was within her discretion in denying the employer and insurer's motion to continue the hearing, especially where the employer and insurer delayed serving their discovery demand for approximately a year after the claim petition was filed and just three to five months before the hearing.

Affirmed.

Determined by Wheeler, C.J., Pederson, J., and Wilson, J.
Compensation Judge: Jeanne E. Knight

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's denial of its motion to continue the hearing and from her award of temporary partial disability benefits from September 13, 1996 through August 1, 1997. We affirm.

BACKGROUND

The employee, Rafael Berdugo, began working for AER Services, Inc., the employer, in 1988. He was hired as a Sohet, an individual formally trained and empowered under Jewish law to perform the kosher slaughter of animals. Beginning in approximately 1993, the employee's work duties required him, on occasion, to travel to slaughter houses in South St. Paul, Windom and Long Prairie, Minnesota, as well as Hartley, Iowa. In performing these functions, the employee would fly from his residence in Chicago, Illinois to Minneapolis and then drive to the slaughter houses. On February 6, 1996, the employee arrived in Minneapolis from Chicago,

en route to participating in kosher slaughtering in Windom, Minnesota and Hartley, Iowa. On February 6, he drove to Windom, performed his job, and drove back to the Twin Cities where he spent the night at the home of a friend. The next day, he was scheduled to supervise and participate in kosher slaughtering in Windom and Hartley. At approximately 3:50 p.m. on February 7th he was involved in a motor vehicle accident in Red Wood Falls, Minnesota, a town approximately 45 miles directly north of Windom.

As a result of this accident the employee claimed certain injuries. The employer denied liability on the basis that the accident did not arise out of and in the course and scope of the employee's work activities. As a result of the filing of a claim petition the matter came on for hearing before a compensation judge on October 8, 1996. The parties stipulated that the employee had sustained injuries to his cervical, thoracic and lumbar spine as well as an injury to his right shoulder and right upper extremity as a result of the February 7, 1996 motor vehicle accident. The employee further claimed to have sustained a temporomandibular joint injury. In her decision, served and filed October 28, 1996, the compensation judge found that the employee's motor vehicle accident occurred while he was in the course and scope of his work activities for the employer. She determined that the employee was entitled to temporary total disability from the date of the injury until June 15, 1996, but denied temporary total disability benefits from that date until August 4, 1996, the last date claimed by the employee at the time of the hearing. The compensation judge found that the employee had reached maximum medical improvement on October 3, 1996, the date of service of an MMI report from Dr. Miller. She also determined that the alleged temporomandibular joint injury was not causally related to the motor vehicle accident.

Within a few days, on October 31, 1996, the employer and insurer appealed the compensation judge's decision and on November 7, 1996, the employee cross-appealed. In the interim, on November 6, 1996, the employee filed a claim petition alleging entitlement to temporary partial disability from and after August 8, 1996. The appeals to this court were resolved in our decision of July 18, 1997, in which all of the decisions of the compensation judge, except for a minor clerical error, were affirmed.

On September 2, 1997, the employer and insurer answered the employee's November 6, 1996 claim petition alleging that the employee had failed to provide any medical or wage information to support his claim for temporary partial disability, that the employee's disability was solely the result of a disease process not related to the February 7, 1996 injury, that the employee had not sustained a permanent injury and that the alleged disability was the result of a superseding intervening cause. Served with the answer was a discovery demand which included a request for the following documents and information:

> 1. Your W-2 statement or any other tax statements filed for the year 1996 and upon completion of 1997.
>
> 2. Complete listing of all employers who the employee has worked for in any capacity since February 7, 1996; please include addresses,

> supervisors' names, human resource contacts and telephone numbers.
>
> 3. A copy of each and every pay stub which the employee has in his possession.
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> 4. Any and all medical documentation which the employee possesses or has knowledge of that give the employee permanent restrictions as a result of his February 7, 1996 injury.
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> 5. Any evidence that the employee has conducted in a job search since February 7, 1996.
>
> 6. Provide the undersigned with your present immigration status and when your work visa, if any, is due to expire.
>
> 7. Names and addresses of all witnesses the employee intends to call at the hearing in the above entitled matter.

By letter dated October 29, 1997, the employer and insurer's attorney supplemented his discovery demand in a letter to the employee's attorney which stated as follows:

> Enclosed herewith please find an authorization to allow an agent of mine to obtain your client's banking and savings account numbers in the above-entitled matter. Please have your client execute this authorization and return it to my office within the next 14 days. I am still awaiting your client's response to request for admissions.
>
> Please consider this a formal demand of discovery for a list of your client's banking, savings, and any other financial institutions where he may make deposits or processes financial transactions. I would also like a copy of his Alien Registration Card and the original Smicha along with the English address of the institution or party I can contact in Israel to verify the same.

On November 17, 1997, the Office of Administrative Hearings served a Notice of Hearing on the parties indicating that the dispute would be heard before a compensation judge on January 22, 1998. On the following day, the attorney for the employer and insurer wrote a letter to the employee's attorney in which he stated as follows:

> Upon receipt of the recent Order of Assignment and Notice of Hearing in the above matter, I have reviewed my file and I see that my Discovery Demand and Request for Admissions are over 60 days late. Given that the hearing is set to take place in two

> months I would request that I receive answers to the same within the next seven days or I will ask for a continuance.
>
> If you have any questions, please feel free to contact me.

At the hearing before the compensation judge the employee's attorney indicated that he served a response to the employer and insurer's discovery demand on November 19, 1997. We do not have a copy of that response in the record. (T. 25.) On December 8, 1997, the employer and insurer moved to compel discovery. In an affidavit attached to the motion, the employer and insurer's counsel stated that as of December 8 the only response received from the employee was a partial tax filing for the year 1996 and some pay stubs.[1] The employer and insurer's motion was apparently heard by Compensation Judge Knight on December 15, 1997. It is unclear what transpired at this hearing as the compensation judge failed to issue an order. (T. 5, 17-18.)

On December 16, 1997, the employee's deposition was taken. During his deposition the employee stated that he had a checking account at the Bank of Lincolnwood, Lincolnwood, Illinois. He also indicated that he did not have any savings account, but did have life insurance and perhaps an account at a broker in the amount of $1,000.00. (Ex. 2, p. 22-26.) The employee also testified he was not sure how much of the income reflected on the first page of the employee's 1996 form 1040 represented income attributable to his wife. He offered to check on the amount. He also stated that he would provide a copy of page 2 of the 1996 tax return and copies of his wife's W-2 and 1099 forms for 1996. (Ex. 2, p. 30.) Following the deposition the employee apparently provided the employer and insurer with a copy of one of the blank checks from his checking account at the Lincolnwood Bank and executed an authorization to the Bank of Lincolnwood to release information to the employer and insurer concerning deposits made to any accounts he had at that bank. (1/16/98 Motion to Continue, Affidavit of Thomas Atkinson dated 1/16/98, & 10, and attached bank authorization.) The authorization stated as follows:

> The undersigned, Rafael Berdugo, hereby authorizes the release to The Hartford, Thomas A. Atkinson, his agents or assigns, all deposit information only pertaining to all of my banking, savings, investments, or any other financial accounts I may have with Bank of Lincolnwood.
>
> /s/ Rafael Berdugo — 12/16/97
> Rafael Berdugo — Date:

[1] Based on the employer and insurer=s attorney=s January 16, 1998 affidavit, attached to his motion to continue the hearing, it appears that these materials were received on December 3, 1997.

Apparently the employee later executed a second authorization which had been amended to include the specific account number for the employee's checking account. (T. 16.) The second authorization was apparently sent to the Lincolnwood Bank. The bank responded, by letter dated December 26, 1997, which stated that the employee had two accounts at the bank. The letter provided the dates each had been opened and the current balances. The first account had a balance of $2,013.78 and the latter had a balance of $11,993.39. (Resp. Ex. 5.) Following the receipt of the bank's letter the employer and insurer's counsel was advised by the bank that it would not release bank deposit records without the payment of $250.00, which amount could only be paid by debiting Mr. Berdugo's account. Employer and insurer's counsel apparently informed employee's counsel of this problem and also requested a signed authorization for release of deposit information concerning the savings account. (T. 7; see also letters from employer's counsel to employee's counsel dated 1/6/98.)

At some point after the deposition but before January 6, 1998, employer's counsel was provided with copies of the employee's checking account bank statements.[2] On January 6, 1998, employer's counsel wrote to employee's counsel complaining that the bank statements were incomplete. In the letter he demanded that the employee provide an itemization of the source of the deposits disclosed in the bank statements. He also requested a similar itemization for any deposits made into the savings account and attached an authorization for release of deposit information concerning the savings account. He sent a copy of the letter to the compensation judge and indicated that he would be seeking a continuance of the hearing scheduled for January 22, 1998. By letter dated January 7, 1998, employee's counsel responded by objecting to any request for continuance.

On January 16, 1998, the employer and insurer served a motion for a continuance of the hearing set for January 22, 1998 and to compel the employee to comply with its discovery demand and request for admissions. The bases for the motion were the requirements of the rules of discovery and the employee's failure to abide by his agreement to provide his complete 1996 tax return and other financial records. The employer and insurer also alleged that at the deposition of the employee on December 16, 1997 the employee had stated that he did not have any savings accounts but that it was subsequently determined that the employee had a savings account at the Bank of Lincolnwood. They stated that the employee had failed to cooperate by refusing to provide an authorization for release of deposit information concerning the savings account. (1/16/98 Motion and Affidavit.) By order served and filed January 21, 1998, Compensation Judge Nancy Olson denied the employer and insurer's motion for continuance since it could not be determined whether the employee had failed to comply with Judge Knight's verbal discovery order from a review of the file. (Judgment Roll: Order of 1/21/98.)

[2] Some or all of these checking account bank statements were introduced into evidence as Respondent's Exhibit 3. The production probably occurred on December 22, 1997. (ER/INS's brief, p. 3.)

The matter came on for hearing before Compensation Judge Knight on January 22, 1998. At the outset the employer and insurer requested that the matter be continued because the employee had failed to comply with the employer and insurer's discovery demands. In addition, employer and insurer's counsel argued that the employee had not disclosed the existence of a second account at the Bank of Lincolnwood, had not provided the signed authorization for obtaining deposit information concerning that account, had not fully cooperated with its attempts to obtain deposit information concerning the employee's checking account and had failed to provide a complete copy of his 1996 tax records. (T. 5-8.) The compensation judge denied the employer and insurer's motion to continue, finding that the employee had substantially complied with the discovery demand when he signed the authorization on December 16, 1997, releasing deposit records for all of his accounts at the Bank of Lincolnwood. She stated that the employee made no attempt to conceal any accounts he had at that bank. She characterized the employer's further attempts to obtain information as a fishing expedition because there appeared to be no information which would indicate that the employee was earning any income off the books. She further stated that she did not recall having suggested at the December 15, 1997 pretrial that the hearing would be continued if the employee failed to provide all of the financial information concerning his bank accounts. (T. 15-17.)

At the hearing, the employee testified that from the date of the motor vehicle accident on February 7, 1996 until the date of hearing he suffered from pain in his lumbar, thoracic and cervical spine, his right shoulder and right upper extremity and from headaches and dizziness, all of which he attributed to the injuries sustained in the 1996 accident. He stated that his conditions were exacerbated by work activity and that he had attempted to engage in work which met the restrictions set forth by Dr. Waxman in his May 1996 note and functional capacities evaluation (FCE) and by Dr. Miller in his September 1996 IME report.[3] The employee testified that after early June 1996, when the employer indicated that it was unable to provide him with work within his restrictions, he attempted to find employment in the Chicago area which utilized his specialized skills and was within his restrictions. He stated that from September 13, 1996 through August 1, 1997 he was employed by three different employers. The primary employer was Chiapetti Wholesale Meat Company, for which he performed kosher slaughter and inspection services on sheep and lambs. He worked approximately two days per week and was paid $500.00 per week. Most of his pay was received in the form of weekly personal checks from Rabbi Segal, his supervisor. Apparently he was paid some W-2 earnings, as evidenced by a W-2 report, indicating earnings of $375.00 during 1996. (Ex. 2, Employee's Depo. of 12-16-97, Depo. Ex. 2, see also Ex. A.) The employee received some payment from Rabbi Segal in almost every week

[3] The May 17, 1996 note of Dr. Waxman released the employee to return to supervisory type work. In his May 20, 1996 FCE, Dr. Waxman permitted the employee to work if he could sit six hours, stand two hours or walk two hours, not to bend, stoop, squat or climb. The employee was permitted to crawl, crouch, kneel, balance and push/pull only occasionally. He was placed under lifting restrictions and was not to flex or rotate his neck on a frequent basis. Dr. Miller placed the employee on a 40-pound lifting restriction. No amendments to these restrictions were made prior to the end of the claim period on August 1, 1997. (Exs. B, G.)

from September 13, 1996 through August 1, 1997. (Pet. Ex. A.) The employee also was employed by the Chicago Rabbinical Council to supervise the kosher presentation of food at Jewish parties and celebrations at local Chicago hotels. According to a letter from the bookkeeper at the Council the employee was employed from March 1 through at least July 24, 1997. His wages ranged from approximately $32.00 per week to $625.00 per week.[4] The employee also worked three weeks for Ray Brothers during the claim period, earning $250.00 each week. (Pet. Ex. A.) The employee testified that all of the wages set forth in Petitioner's Exhibit A represented the only earnings that he received during the claim period from September 13, 1996 through August 1, 1997.[5] The employee testified that he worked all the hours which were available to him in his field of expertise, given his restrictions.

At the hearing the employer introduced, as Respondent's Exhibit 3, copies of bank statements from the employee's checking account at the Bank of Lincolnwood covering the period from September 14, 1996 through July 30, 1997, with the exception of the bank statements covering the period from January 16, 1997 through April 14, 1997.[6] During cross-examination, employer's counsel pointed out to the employee that during each of the months from October 1996 through July 1997, for which there were bank statements, that the amount of deposits into his checking account far exceeded the amounts of income set forth on his temporary partial disability schedule and reflected in the checks from Rabbi Segal or in the payroll records from his other employers.[7] The employee testified that he did not know the source of each of the deposits reflected in his banking statement. He indicated that the checking account was a joint one with his wife and that she made deposits from her earnings. He also testified that he received and

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[4] Petitioner's Exhibit A claims pay of $25.11 per week from the CRC during the first pay period. This figure assumes the employee worked 4.3 weeks, from February 25, 1997 through March 24, 1997. The CRC letter, however, indicates that the employee did not start work until March 1, 1997. He therefore worked, at most, 24 days or 3.4 weeks with a resultant average weekly wage of $31.76.

[5] We note that the letter from the CRC was dated July 30, 1997 and did not cover the last week of July 1997. An update should be obtained from CRC regarding earnings from July 24, 1997 through August 1, 1997.

[6] The documents contained in the exhibits file also include bank statements for periods after July 31, 1997. Since such records were for periods outside the claim period they were ruled inadmissable. (T. 160.)

[7] For example, for the following calendar months Exhibit 3 showed checking account deposits as indicated: October 1996 - $4,751.19; November 1996 - $4,008.13; December 1996 - $3,856.97; May 1997 - $5,966.43; June 1997 - $2,778.77; and July 1997 - $6,702.47. For the same months Exhibit A showed earnings which were considerably lower: October - $2,506.10; November - $1,900.00; December - $1,850.00; May - $3,505.30; June - $4,281.00; and July - $2,599.04. The checking account records from January through April 1997 were incomplete.

deposited funds from life insurance and his car insurance. With respect to the savings account at the Lincolnwood Bank, the employee testified that he had saved the approximately $12,000.00 prior to his injury in 1996 and had deposited the funds in a savings account for his children. He essentially testified that he did not make any deposits to that account following the accident in February 1996.

The employee testified that he felt that he was limited in his ability to work by the injuries caused by the February 1996 accident. He stated that because of the restrictions that had been imposed by his doctor and Dr. Miller he had limited his work activities to slaughtering and inspecting only smaller animals (lambs, sheep or calves) or to supervising kosher food presentation at celebrations and parties. The compensation judge, in her findings and order dated March 5, 1998, found that the employee worked under restrictions attributable to the February 1996 injuries, that the actual earnings reflected in Exhibit A were equivalent to his earning capacity and awarded temporary partial disability benefits from September 13, 1996 to August 1, 1997. The employer and insurer appealed the compensation judge's refusal to continue the hearing and the award of temporary partial disability benefits.

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 (1992). 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 Food Prods., 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.

DECISION

Continuance of Hearing

The first issue raised by the employer and insurer on appeal is the compensation judge's refusal to continue the January 22, 1998 hearing because the employee had failed to fully comply with its discovery demands. As indicated above, at the hearing the compensation judge noted that the employee had substantially complied with employer's request for access to the deposit records of the employee's accounts at the Lincolnwood Bank when he executed the blanket authorization to the bank on December 16, 1997. The compensation judge was not sympathetic

to the employer's position that the employee's delays made it impossible for it to obtain full and complete information concerning both accounts from the Lincolnwood Bank. She noted that employer's counsel had neglected to file his initial discovery demand until ten months after the employee had filed his claim petition and only five months before the hearing. Essentially she found that the employee's right to proceed on his claim for temporary partial disability should not be delayed where the employer and insurer's counsel's delay in instituting discovery had been a substantial contributing cause of their inability to obtain the employee's bank records.

The employer's appeal is based on its position that the records it did receive indicate that the employee deposited sums into his bank accounts which were substantially in excess of the amounts that he claimed he was earning. They assert that these differences needed to be explained by the employee and that the deposit records of the bank could be used to determine the sources of the deposits. The employer and insurer contend that this information was crucial to its defense on the issue of the amount of the employee's loss of earning capacity. The employer and insurer agree that while their answer was untimely, their discovery demands were not late and that had the employee complied with the 30-day response time provided in the rules there was more than adequate time to complete discovery. They further argue that the employee was obligated to provide records and not merely execute an authorization permitting the employer and insurer to obtain the records. With respect to the authorizations, they contend that the employee was obligated to assist the employer and insurer in its attempt to use the authorizations at the employee's bank. They point out that the employee agreed to provide the documents prior to the hearing. In addition, they argue that the compensation judge stated on December 15, 1997 that if the employee failed to provide the documents that the hearing would be continued. (ER/INS's brief, pp. 3, 5-7.)[8]

While we understand the employer and insurer's concerns, we do agree with the compensation judge and with employee's counsel that had the employer and insurer filed its discovery demand shortly after the employee filed its claim petition in November of 1996, it would have been highly unlikely that any of the problems which formed the basis for the employer and insurer's request for a continuance would have arisen. While it does appear that the employee did not provide the employer and insurer with all of his records, he did provide them with bank statements from his checking account for most of the period involved and with executed authorizations, drafted by the employer and insurer, for release of full deposit information for all accounts at the employee's bank. It is unclear whether the employee fully cooperated with the employer and insurer's attempts to obtain information pursuant to the authorization, but there is no indication that the employee interfered with the employer and insurer's attempts to get the

[8] While the employer and insurer may be correct, it is impossible for this court to review what transpired at the December 15, 1997 pretrial hearing on the motion to compel. No record was made and unfortunately no order was issued. When the compensation judge failed to issue an order it was incumbent on the employer and insurer to contact the judge and obtain an order. The employee's post hearing affidavit, attached to its brief, was inappropriate and will not be considered by the court.

information from the bank.[9] Further, the employee testified that the only earnings that he had during that period were reflected by the checks and payroll records submitted as Exhibit A.

In making her decision to refuse to continue the matter the compensation judge was free to accept the employee's testimony as credible and accept his explanation that the differences between the amounts of deposits and his claimed earnings were related to deposits made by his wife from her earnings and payments from other insurance companies. While we are troubled by the employee's failure to provide information on a timely basis, we do not believe that the compensation judge has abused her discretion with respect to the processing of this case, given the employer and insurer's delay in initiating the discovery process and the fact that the hearing on the matter had been stayed by the prior appeal to this court.

Temporary Partial Disability

In order to be entitled to receive temporary partial disability benefits the employee must show a work-related injury resulting in disability, loss of earning capacity causally related to the work-related disability, the ability to work subject to the disability, and an actual loss of earning capacity. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). In this case the compensation judge found that the employee was subject to restrictions in his ability to work causally related to the February 7, 1996 injury. This finding was supported by a variety of evidence: (1) the fact that restrictions placed on the employee's activities in May and September 1996 were not removed by either Dr. Waxman or Dr. Miller at any time prior to August 1, 1997; (2) the employee's testimony concerning the onset of his difficulties and the extent of his pain and limitations during the period of claimed entitlement to temporary partial disability; (3) Dr. Miller's finding that the employee had a 3.5% permanent partial disability; (4) the QRC's testimony that the employee would require rehabilitation assistance in order to assist him in finding suitable full-time employment; (5) the employee had a very specialized skill which limited his ability to find employment; and (6) the employee's testimony that he was working all of the hours that were available to him during the claim period.

The employer and insurer made two arguments: (1) that the employee did not prove that he had made a reasonably diligent job search and (2) that he actually earned more than he set forth in his temporary partial disability schedule (Exhibit A) as evidenced by the large deposits made to his checking account and the size of his savings account. (ER/INS's brief, pp. 7-9.) While we agree that a diligent job search may be a factor considered by a compensation judge in reviewing a temporary partial disability claim, such consideration is not required. That is especially true in a case where the employee has actually found substantial work. In this case, the employee was able to find work with three employers, sometimes working two jobs, all without the aid of rehabilitation assistance. We note that the employer and insurer did not provide any evidence that additional work within the employee's expertise and restrictions was available to the

[9] If the bank refused to fully honor the authorization the employer and insurer could to have obtained a subpoena duces tecum or taken a bank official's deposition.

employee in the Chicago area or from the employer. Under the circumstances of this case, the employee was entitled to the presumption that his actual earnings were equivalent to his earning capacity. On the issue of his actual earnings, the compensation judge was free to find the employee's explanation for the difference between his bank deposits and the payments from employers to be credible. The employer and insurer failed to establish that any of the excess deposits were from other income sources. Because the compensation judge did not abuse her discretion in refusing to continue the hearing, based on the evidence presented, her decision concerning the level of the employee's earnings is supported by sufficient evidence in the record. With the exceptions noted in the footnotes above, the compensation judge's award of temporary partial disability benefits is affirmed.