

RICHARD C. BORCHERT, Employee/Appellant, v. AMERICAN SPIRITS GRAPHICS and AMERICAN STATES INS. CO., Employer-Insurer, and AMERICAN SPIRITS GRAPHICS and AMERICAN COMPENSATION INS., RTW, INC., Employer-Insurer, and BCBS OF MINNESOTA, ALLINA/ABBOT NORTHWESTERN HOSP, and MII LIFE, INC., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS  
FEBRUARY 17, 1998

HEADNOTES

TEMPORARY PARTIAL DISABILITY; EARNING CAPACITY. Where the employee's preinjury weekly wage was partially based on overtime earnings but the employee only returned to full-time (40 hours per week) work with the employer, his actual earnings should be presumed to be equivalent to his earning capacity. This presumption can be rebutted by a showing that he refused offered overtime or could have increased his earnings at a second job. A reduction in overtime availability as a result of a fall-off in the employer's business would not rebut the presumption.

PENALTIES - SUBSTANTIAL EVIDENCE. Where a question existed as to the second insurer's level of responsibility for payment of benefits, where that insurer had advanced at least some money to the employee pending joinder of the first insurer, and where the employee had received at least some disability benefits from the employer's short-term disability carrier, the compensation judge's denial of penalties pursuant to Minn. Stat. § 176.225 was within the judge's sound discretion and was not clearly erroneous and unsupported by substantial evidence.

PENALTIES - SUBSTANTIAL EVIDENCE. Where the second insurer's independent examiner had apportioned no more than 50% liability for benefits to the second insurer, the compensation judge's imposition of only a 5% penalty on only 50% of the outstanding medical expenses payable after hearing was not clearly erroneous and unsupported by substantial evidence, notwithstanding the fact that the penalized insurer stipulated at hearing to being liable for 75% of the employee's benefits.

MEDICAL TREATMENT & EXPENSE - SUBSTANTIAL EVIDENCE; EVIDENCE - OBJECTIVE EVIDENCE. Where there was no documentary evidence or testimony offered to support the employee's claim, the compensation judge's denial of reimbursement to the employee for the alleged cost of a prescribed cervical pillow was not clearly erroneous and unsupported by substantial evidence, notwithstanding the employer's arguably blanket stipulation to the reasonableness and necessity of claimed medical expenses.

Affirmed in part, reversed in part and remanded.

Determined en banc

Compensation Judge: Kathleen Nicol Behounek.

## MAJORITY OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's denial of certain temporary partial disability benefits and of certain penalties and medical expenses. We affirm in part, reverse in part, and remand.

### BACKGROUND

On June 29, 1994, the employee sustained a work-related injury to his cervical spine while working as a first pressman for American Spirits Graphics [the employer]. At the time of the injury, the employer was insured against workers' compensation liability by American States Insurance Company [American States]. On June 23 and September 5, 1995, the employee sustained additional work-related cervical injuries while performing the same job. At the time of the latter injury, the employee's weekly wage was \$1,231.18, based on an hourly wage of \$19.98. The employee's weekly wage recognized that the employee regularly worked overtime.<sup>1</sup> The employer was insured at the time of these injuries by American Compensation Insurance, RTW, Inc. A cervical myelogram and CT scan performed on September 11, 1995, disclosed large herniated discs with nerve impingement at spinal levels C5-6 and C6-7. Orthopedic surgeon Dr. Edward Hames recommended an anterior discectomy and fusion at those levels, which surgery was performed on September 21, 1995. Since the employer/American Compensation Insurance [RTW] had denied liability, the employee filed a claim petition on October 10, 1995, seeking payment of temporary total disability benefits from September 7, 1995, undetermined permanent partial disability benefits, and medical expenses.

On November 14, 1995, the employee returned to light duty work with the employer and a week later was released by Dr. Hames to return full time to his pre-injury job as a first pressman. The employee was restricted from lifting over fifty pounds. When the employee subsequently complained of continued neck pain and occasional tingling in his arms in January of 1996, Dr. Hames ordered a myelogram/CT scan, which proved to be essentially negative. On February 6, 1996, the doctor reiterated his conclusion that the employee was physically able to perform his preinjury job subject only to a fifty-pound lifting restriction. On February 21, 1996, Dr. Hames further restricted the employee by limiting his overtime to eight hours per week. On that same date, the employee filed an amended claim petition, alleging entitlement to temporary partial disability from November 15, 1995, penalties pursuant to Minn. Stat. § 176.225, and payment of additional medical expenses.

On April 2, 1996, the employee was examined for RTW by neurologist Dr. Daniel Randa. While concluding that the employee's September 1995 injury was a substantial

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<sup>1</sup> According to an April 11, 1996, letter to Dr. Hames from a nurse who apparently worked as a case manager for RTW, the employee had been working an average of 49.38 hours per week prior to his surgery.

contributing factor to [the employee's] clinical picture, Dr. Randa attributed fifty percent of the employee's disability and need for surgery to the employee's June 1994 work injury. It was also Dr. Randa's opinion that the employee was fully capable of continuing in his capacity as a first pressman and could have his eight-hour-per-week overtime restriction gradually liberalized over the next six weeks to allow full unrestricted activity. On April 17, 1996, Dr. Hames reported to RTW that he now saw no need for restrictions regarding [the employee's] work duration. The following month, RTW paid \$7,500.00 to the employee as an advance toward potential disability obligations. On June 14, 1996, the employee amended his claim petition a second time, joining American States and specifying his permanency claim at 19% of the whole body.

On November 11, 1996, the employee was examined for American States by orthopedist Dr. Elmer Salovich. It was Dr. Salovich's conclusion, in his report of November 25, 1996, that the employee's September 1995 work injury was responsible for 75% of the employee's treatment and disability subsequent to that date. He apportioned the remaining 25% among lesser injuries in June of 1994, January of 1995, and June of 1995. Dr. Salovich also concluded that the employee was capable of working subject to a fifty-pound lifting restriction, that he should avoid sustained unusual posture or repetitious stressful turning, pushing, and pulling involving his neck, and that he was capable of working overtime.

Following a January 7, 1997, examination of the employee, Dr. Hames reported to RTW that he now felt, after discussion with [the employee,] that he should have a permanent restriction of overtime activities, to limit him to no more than 12 hours of overtime activity in a weekly work duration.

The matter was heard by a compensation judge at the Office of Administrative Hearings on May 9, 1997. The principal issues presented included the employee's entitlement to temporary partial disability benefits from November 15, 1995, and to penalties against RTW pursuant to Minn. Stat. § 176.225 for unreasonable delay in payment of benefits. The parties stipulated that the employee had sustained work related cervical injuries on June 29, 1994, June 23, 1995, and September 5, 1995, and that liability for any benefits due as a consequence of the employee's three work injuries should be apportioned 75% to RTW and 25% to American States.<sup>2</sup>

At the time of the hearing, the employee testified that he was working in his pre-injury position, at a slightly higher hourly rate of pay than he enjoyed at the time of his injuries. His actual income since his return to work had been less than his weekly wage because he had not been working as many overtime hours as he had prior to September 5, 1995. The employee testified that since his return to work he had only been offered overtime work on an occasional

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<sup>2</sup> Certain findings of the compensation judge were not appealed: (1) that the employee was temporarily totally disabled from September 7, 1995, through November 14, 1995; (2) that the employee has an 18% whole body permanent partial disability pursuant to Minn. R. 5223.0070, Subp. 5B; (3) that the employee is entitled to reimbursement for certain medical mileage; and (4) that RTW should pay the employee's outstanding medical bills, which exceeded \$20,000.00 at the time of hearing, subject to the claims of two intervenors.

basis. He stated that, as a result of his physical condition, he had sometimes declined this overtime, even though the work offered was within his physical restrictions. The employee also conceded that if he had worked twelve hours of overtime a week, the amount permitted by his most recent restrictions, he would have earned substantially more than his pre-injury wage. Anthony Gemmato, the employer's plant superintendent, testified that overtime hours available in the employee's department had dropped from 24,003 in 1994 to 11,564 in 1996 and continued to decline in 1997.

Following the hearing, the compensation judge concluded in part that the amount of overtime that the employee had been able to work since November of 1995 had decreased as a result of economic reasons and not as a result of restrictions caused by the employee's work injuries. In light of that finding, and also because the employee's post-injury loss of income was solely the result of the loss of overtime work, the judge denied the employee's petition for temporary partial disability benefits after November 21, 1995. (Findings 11 & 12.) The judge also found that the employee had failed to prove that RTW had vexatiously or unreasonably delayed payment of the employee's wage replacement and permanency benefits. She did find that RTW had unreasonably refused to pay medical expenses but limited the penalty for that refusal to 5% of 50% of those expenses. Finally, while awarding payment of all other medical expenses and medical mileage that the employee had claimed, the judge denied payment for the cost of a prescribed cervical pillow for which the employee claimed to have paid \$9.99. The employee appeals.

## STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1996). 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

### Temporary Partial Disability

The compensation judge denied the employee's claim for temporary partial disability benefits after November 21, 1995, because she found that the cause of the employee's lower wages after that date was not related to any restrictions precipitated by his work injuries. She found that his reduced earnings were caused by the employee working fewer overtime hours. She determined that the loss of overtime work was the result of economic conditions attributable to the employer's business. (Finding 11.) In her memorandum, the compensation judge explained her decision as follows:

During a large portion of time since the employee returned to work following his work injury, he was unrestricted in terms of the overtime hours he could work. However, the employee's time records showed that he only occasionally worked overtime. When he was restricted in terms of the hours of overtime he could work, he worked the maximum amount of overtime allowed by his doctor on only one occasion.

The employer also demonstrated that if the employee had worked 12 hours of overtime since January of 1997, his weekly wage would exceed his pre-injury weekly wage because of his current hourly rate.

The employee's primary argument on appeal is that no factual evidence or reasonable inference exists for the compensation judge's finding that the employee had no restrictions on the amount of overtime that the employee could work between April 17, 1996 and January 7, 1997. The employee cited his own testimony that he had turned down overtime or had not been offered overtime because of his restrictions.

In order for temporary partial disability benefits to be due, the employee must be subject to an actual loss of earning capacity that is causally related to his work-related disability. See Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 9, 34 W.C.D. 314, 315 (Minn. 1981), citing Dorn v. A. J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). When a disabled employee who is released to return to full-time work finds a full-time job, generally the earnings from such employment create a presumption of earning capacity. Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 314 (1960); Einberger v. 3M Co., 41 W.C.D. 727 (W.C.C.A. 1989). The presumption of actual post-injury earnings constituting earning capacity is a rule of law dictating decision on unopposed facts. Jerabek v. Teleprompter Corp., 255 N.W.2d 377, 380, 29 W.C.D. 621, 625 (Minn. 1977). In appropriate circumstances, this presumption can be rebutted with evidence indicating that the employee's ability to earn is different than the post-injury wage. Patterson v. Denny's Restaurant, 42 W.C.D. 868, 874 (W.C.C.A. 1989); Einberger, 41 W.C.D. at 739.

In this case, the employee returned to full-time work. As a result, his earnings were presumed to represent his earning capacity. The burden of persuasion shifted to the employer to establish that the employee, whose preinjury wage was based on overtime earnings, could have worked overtime or could have obtained additional work for another employer which would have increased his earnings. In order to prove that the employee could have earned more by working overtime at the employer, the employer must show that the employee voluntarily refused overtime offered to him. The presumption cannot be rebutted merely by showing that the employee did not work as much overtime as he had before his injury. The fact that overtime has been reduced as a result of a reduction in the employer's business or a shift of overtime to different positions is not a defense to the employee's claim. We therefore remand this issue to the compensation judge for reconsideration of the evidence consistent with the principles set forth above. The taking of additional evidence or argument will be solely at the compensation judge's discretion.

### Penalties

#### Delay in Payment of Benefits

In her memorandum, the compensation judge concluded that RTW's delay in paying the employee more than \$7,500 in disability benefits was not unreasonable because (1) RTW's independent examiner had concluded that RTW was only 50% responsible for the employee's disability, (2) the employee had received \$3,900.00 in short-term disability benefits from intervenor MII Life, Inc., while he was totally disabled, and (3) all of the employee's temporary partial claim and a portion of his permanency claim remained in dispute until the time of hearing. The employee suggests that RTW should have advanced considerably more than the \$7,500, based on (1) Dr. Randa's April 1996 opinion that the September 1995 injury was a substantial contributing factor in the employee's condition, (2) Dr. Salovich's November 1996 conclusion that most of the employee's disability was attributable to the September 1995 injury, and (3) RTW's own eventual stipulation at hearing that temporary total disability was undisputed.

An award of penalties for unreasonable delay in payments requires a showing that the payment was unquestionably due. See Morgan v. Homes by Windbreak, 41 W.C.D. 923, 925 (W.C.C.A. 1989). The only benefits that were undisputed at the time of hearing were compensation for about two months of temporary total disability<sup>3</sup> and compensation for a 14%

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<sup>3</sup> Both RTW and American states apparently conceded the employee's claim from just after the date of the employee's injury to his return to work on November 14, 1995. While temporary total disability was listed as an issue in the judge's decision, the judge indicated in her memorandum that the parties had not disputed the employee's entitlement to the temporary total benefits claimed. The judge's award of those benefits was not appealed.

permanent partial disability.<sup>4</sup> Furthermore, uncontested permanency benefits remained subject to varying opinions as to apportionment. All but one week of the employee's entitlement to eighteen months of temporary partial disability benefits remained in dispute. Generally, where a bona fide question exists as to an employer and insurer's level of responsibility for payment, penalties are not warranted. See Sass v. Frazier Constr. Co., 44 W.C.D. 447, 453 (W.C.C.A. 1991). Because RTW had advanced some funds to the employee pending joinder of American States, we cannot say that the judge's denial of penalties for delay in payment of the disputed disability benefits was unreasonable. Therefore we affirm that decision. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239; see also Thompson v. Nelson Constr. Co., 50 W.C.D. 222, 230 (W.C.C.A. 1993) (an award of penalties pursuant to Minn. Stat. § 176.225 rests within the sound discretion of the compensation judge), citing Erickson v. TEXACO Refining, 45 W.C.D. 181, 190 (W.C.C.A. 1991), citing Holden v. Fluorocarbon Co., 44 W.C.D. 168, 174 (W.C.C.A. 1990).

#### Limitation of Penalty for Refusal to Pay Medical Expenses

Noting in her memorandum that the amount of the employee's undisputed outstanding medical expenses had been significant, the compensation judge concluded that it was unreasonable for RTW to have refused to pay their apportioned share of those expenses prior to hearing. Consistent with that conclusion the judge ordered RTW to pay a 5% penalty on 50% of those expenses. The employee contends that a mere 5% penalty on only 50% of the unpaid expenses is clearly insufficient, in that the parties had stipulated at hearing that responsibility for liability was to be apportioned 75% to RTW and 25% to American States. In reaching her decision, the compensation judge obviously considered the opinion of RTW's consulting expert, Dr. Randa, who apportioned only 50% of the liability in this case to RTW. As a result, 50% of the medical expenses remained in dispute until the time of hearing, and we cannot conclude that it was unreasonable for the compensation judge to base RTW's penalty only on the undisputed amount. Nor can we conclude that the judge's imposition of a 5% penalty against RTW on that portion of the expenses was unreasonable. See id. (an award of penalties and the level of assessment under Minn. Stat. § 176.225 rests within the sound discretion of the compensation judge). Therefore we affirm the judge's decision on this issue. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

#### Cervical Pillow

The compensation judge ordered reimbursement of medical mileage to the employee and either payment or reimbursement of virtually all other medically related expenses at issue to two intervenors. Nevertheless, in Finding 21 the compensation judge concluded that [t]he evidence fails to document that the employee paid \$9.99 for a pillow prescribed by his doctors for his work related injuries. On appeal, the employee emphasizes that RTW stipulated that all medical expenses were reasonable and necessary. The employee argues that it was on this basis that he offered no testimony or documentary evidence at hearing to support his claim for

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<sup>4</sup> As rated by Dr. Randa. Four percent whole body impairment, the difference between Dr. Randa's rating and Dr. Salovich's 18% rating, remained in dispute at the time of hearing.

reimbursement for the cervical pillow. The employee's assumption concerning RTW's position may have been inaccurate. Apparently RTW did not concede its liability for the pillow. When she was asked whether there was a dispute on the mileage and pillow claims of the employee, RTW's attorney responded, There may be . . . . Although questions as to the mileage claim were subsequently expressly resolved, the pillow issue was never again addressed. While we may have reached a contrary conclusion had we been the trier of fact, we cannot conclude, in such circumstances, that it was unreasonable for the compensation judge to deny payment for the cervical pillow in the absence of any documentary evidence that the purchase was actually made. Because it was not unreasonable, the compensation judge's denial of payment for the cervical pillow is affirmed. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

## DISSENTING OPINION

R.V. (SALLY) OLSEN, Judge

I disagree. I believe that substantial evidence supports the compensation judge's findings with respect to temporary partial disability benefits, and I would, therefore, affirm.

The compensation judge found that the employee's reduced earnings following his September 5, 1995 injury were not causally related to his work injuries, but were the result of non-work-related economic factors reflecting a decrease in the amount of overtime work generally available from the employer. (Findings 10, 11, 12.) The employer's plant superintendent, Anthony Gemmato, testified that, based on company production reports, overtime hours in the employee's department had dropped from 24,003 in 1994 to 11,564 in 1996 and continued to decline in 1997. The employee agreed that work was slow at various times, and that there was not as much overtime work at the present time as there used to be. (T. 62-63, 65-66, 84-86.) The employee further agreed that since February 1996, although released to do overtime work, there have been substantial periods where he has worked no overtime. He acknowledged that he had, on occasion, voluntarily declined overtime work, even though the work was within his physical restrictions, and conceded that if he worked the twelve hours of overtime a week allowed under his current restrictions, he would earn more than his pre-injury wage. (T. 47-48, 51-52, 63, 70.) Moreover, the records of Dr. Hames, the employee's treating doctor, and the reports of both independent medical experts (IMEs) permit the conclusion that the employee had no significant restrictions on overtime work during most of the period in dispute. (See findings 5, 8, 9; reports and records of Dr. Hames, Dr. Randa, and Dr. Salovich.)

Temporary partial disability benefits are payable when an employee is working and Aearning less than [his pre-injury] weekly wage . . . , and the reduced wage the employee is able to earn in [his] partially disabled condition is due to the injury. Minn. Stat. § 176.101, subd. 2(b) (emphasis added). Thus, to be entitled to temporary partial disability benefits the employee must prove an actual loss of earning capacity that is causally related to the [employee's] disability. Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976).



It is true that, in determining entitlement to temporary partial disability benefits, an employee's actual post-injury earnings are presumed to be an accurate measure of the employee's lost earning capacity. Here, however, no one is disputing that the employee has had reduced earnings due to significantly less overtime work since his September 5, 1995 work injury. The question here is whether a causal relationship has been established between the employee's admittedly reduced earnings and his work-related disability.

Whether an employee's reduced earnings during a period of post-injury employment is due to the employee's injury or to some non-work-related cause must be determined on the facts peculiar to each case, and is a question of fact for the compensation judge. Dorn, id. I believe that substantial evidence supports the compensation judge's conclusion that the employee's reduced wages resulted from a loss of overtime work due to personal and economic factors, and was not causally related to the [employee's] disability. I would, therefore, affirm the compensation judge's denial of temporary partial disability benefits. Minn. Stat. § 176.421, subd. 1(3).

RICHARD C. HEFTE, Judge  
Dissenting

I join in the dissent of Judge Olsen.