HARVEY H. BOYD, Employee/Appellant, v. SUNRISE PAINTING AND WALLCOVERING and AETNA CASUALTY AND SURETY CO./TRAVELERS GROUP, Employer-Insurer, and MINNEAPOLIS PAINTING INDUS. HEALTH AND WELFARE FUND, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 3, 1998

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including the opinion of the independent medical examiner, supports the compensation judge's determination that the employee's left arm osteoarthritis, ulnar neuropathy, and left thumb condition were not causally related to his work as a painter.

TEMPORARY PARTIAL DISABILITY. The compensation judge erred in denying temporary partial disability benefits where the employee had returned to work in a full-time job, earning $240.00 a week. The compensation judge correctly concluded, however, that the employee was entitled to temporary partial benefits at an imputed weekly wage of $480.00, rather than his actual wage, where the employee had frustrated a return to a light-duty job, previously offered by the employer, paying $12.00 an hour, and the findings and order is modified accordingly.

Affirmed in part, reversed in part, and modified in part.

Determined by Wheeler, C.J., Wilson, J. and Hefte, J.
Compensation Judge: William R. Johnson

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's finding that the employee failed to prove that his left elbow osteoarthritis, ulnar neuropathy, and left thumb condition were causally related to his employment, and from the judge's consequential denial of permanent partial disability benefits and payment of certain medical expenses. The employee also appeals from the compensation judge's determination that the employee was not entitled to temporary partial disability benefits. We affirm the compensation judge's finding that the employee's left arm ulnar neuropathy, left elbow osteoarthritis and left thumb condition were not work-related, but modify and reverse, in part, the compensation judge's findings with respect to temporary partial disability benefits.

BACKGROUND

The employee, Harvey H. Boyd, worked as a commercial painter for over thirty years. From 1980 to 1996, he was employed by Sunrise Painting and Wallcovering, the employer,

as a painter and painting superintendent. (T. 8, 15.) At the time of the hearing below Mr. Boyd was fifty-six years of age. Mr. Boyd did not graduate from high school, but did become a journeyman painter after attending a painting program at the Dunwoody Institute in the late 1950s and early 1960s.

On September 16, 1994, the employee sought treatment from Dr. Paul Donahue at Metropolitan Hand Surgery Associates. The employee reported progressively increasing weakness in his left hand, resulting in difficulty at work, along with recent right hand problems. Examination of the left upper extremity revealed marked atrophy of the intrinsic muscle of the hand, an absence of two-point sensation in the 4th and 5th fingers, abduction deformity of the 5th finger, positive Tinel's at the wrist and the cubital tunnel, loss of motion in the elbow, and a prominent clicking sensation with passive elbow extension. There was also moderate loss of motion in the right elbow with mild tenderness over the ulnar nerve. X-rays showed osteoarthritic changes in the left elbow with osteophytes and calcifications within the cubital tunnel, and, on the right, prominent osteoarthritic changes of the elbow with old, healed fractures of the radius and ulna in the forearm. Dr. Donahue diagnosed osteoarthritis in both elbows, and severe cubital tunnel syndrome on the left which he believed to be work-related. (Exh. A, 9/16/94.)

The employee reported the injury to his employer on the day of his appointment with Dr. Donahue. The employee was removed from his painting responsibilities and began working as a superintendent for the employer, at no wage loss. He remained in this position through December 20, 1996. (FROI, filed 5/21/96; T. 30, 56, 197, 211; see Exh. D.)

An EMG, performed on October 12, 1994, confirmed a severe ulnar neuropathy at the left elbow. The EMG also revealed moderate to moderately severe carpal tunnel syndrome in both wrists. On November 3, 1994, the employee underwent surgery to release the left ulnar nerve, along with a left carpal tunnel release. The employee was subsequently released to return to work using his right hand only. On January 3, 1995, following a period of recovery, including a course of physical therapy, Dr. Donahue noted that the employee continued to have very marked atrophy in the left hand, with very weak abduction and slight clawing of the 4th and 5th fingers. In Dr. Donahue's opinion, the employee was not capable of returning to work as a painter due to the severe atrophy and weakness of his left hand. (Exh. A: chart notes 10/12/94 to 9/5/95; 11/3/94 United Hospital operative report.)

The employee continued to treat with Dr. Donahue, and in May 1995, increasing right wrist pain and paresthesias were noted. On August 24, 1995, the employee underwent a successful right carpal tunnel release. Following that surgery, on September 5, 1995, Dr. Donahue imposed restrictions on the use of the right hand, including no heavy or repetitive gripping, and no repetitive lifting over ten pounds. (Exh. A: 3/29/9 to 9/5/95; 8/24/95 United Hospital operative report.)

On October 11, 1995, the employee reported instability in the metacarpal phalangeal (MP) joint of his left thumb. Dr. Donahue noted that the employee's left hand symptoms were worsening. The doctor believed that the employee would require additional

surgery in the nature of a fusion to stabilize the thumb joint and a Zancolli tendon transfer to prevent clawing of the 4th and 5th fingers. (Exh. A: 10/11/95.) On November 14, 1995, the employee was seen by Dr. Chris Tountas, at the request of the employer, for a second opinion regarding further surgery. Dr. Tountas agreed, generally, with Dr. Donahue's diagnoses, and believed that the proposed surgery was reasonable. He did not believe, however, that the employee's left thumb instability or his ulnar neuropathy were the result of any injury at work. (Exh. 8, Dep. Exh. 1.) The surgery was performed by Dr. Donahue on March 21, 1996. (Exh. A: 3/21/96 United Hospital operative report.)

On April 8, 1996, the employer and insurer filed a notice denying liability based on Dr. Tountas's November 14, 1995 report. In response, the employee filed a claim petition on June 28, 1996, alleging an injury on September 16, 1994, in the nature of bilateral carpal tunnel syndrome and a left ulnar neuropathy. On July 17, 1996, Dr. Donahue opined that the employee had reached maximum medical improvement (MMI), and provided a permanent partial disability rating of 18 percent for injury to the ulnar nerve plus 5 percent for the left thumb fusion. The employer and insurer served a copy of Dr. Donahue's MMI report on the employee and his attorney on July 26, 1996. (Exh. A: 7/17/96; Exh. 1.)

Dr. Tountas examined the employee again on October 17, 1996. He noted atrophy of the intrinsic musculature of the left hand with the 4th and 5th fingers in a flexed position, and loss of sensation in the 3rd, 4th and 5th fingers. The left thumb was fused in a neutral position. Dr. Tountas provided a permanency rating for the left hand and arm of 34 percent, including 18 percent for ulnar nerve palsy, 10 percent for sensory loss in the ulnar nerve distribution, and six percent for the thumb fusion. He also provided restrictions of no firm grasping or heavy lifting with the left hand, no repetitive firm grasping with the right hand, limited flexion and extension of the elbows, bilaterally, and no use of power or vibrating tools. In a supplementary report dated December 20, 1996, Dr. Tountas opined that the employee's bilateral carpal tunnel syndrome was work-related, but reiterated that, in his opinion, the employee's bilateral elbow osteoarthritis, left ulnar neuropathy, and left thumb instability were not work-related. (Exh. 8, Dep. Exhs. 2, 3.)

Meanwhile, the employer had become dissatisfied with the employee's job performance, and on December 20, 1996, the employee was terminated from his position as a superintendent. The employer offered two alternative jobs: a modified job as a painter, or a job driving truck for $12.00 an hour, about half his previous wage.[1] The employer stated that the employee's physical restrictions would be taken into consideration and reasonable accommodations made. The employee accepted the truck driving job on December 30, 1996, and agreed that he would begin work on January 7, 1997, following an appointment with Dr. Donahue scheduled for January 6, 1997. (T. 56-58, 66, 140, 199-206, 211, 213-14; Exhs. D, E, F.)

[1] The parties stipulated that the employee's pre-injury average weekly wage was $915.64. The employer offered the truck driving job at a wage of $12.00 an hour that, assuming a 40 hour work week, would have resulted in a weekly wage of $480.00. (Finding 4; Exh. D.)

On January 6, 1996, Dr. Donahue indicated that he agreed with Dr. Tountas's restrictions. He stated specifically that he did not think the employee could return to work as a painter, even with tool modifications, but advised the employee that he was capable of driving a truck so long as there was no repetitive loading or unloading. Dr. Donahue further observed that it would be worthwhile to obtain a functional capacity exam (FCE) to more precisely evaluate the employee's capabilities. (T. 143-44; Exh. A: 1/6/97.)

The employee did not go to work on January 7th, but instead telephoned Kelli Peifer, the president of Sunrise Painting, to inform her that he was going to have a functional capacities assessment. On January 7, 1997, the employee contacted Orthopaedic Sports, Inc. to make an appointment for an FCE. He was informed that they would need to get authorization from the insurer for the evaluation and that the process could take up to seven days. The employee was told on January 13, 1997 that the insurer had denied the request. On or about January 13, 1997, the employee again telephoned the employer, and was asked to get his restrictions in writing. The employee requested written work restrictions from Dr. Donahue's office that same day, which he received by mail on January 15, 1997. The following day, January 16, 1997, he reported for work, but was told that the truck driving position had been filled the previous day. (T. 60-64, 145, 192, 215-18; Exhs. C, H, I.)

On or about January 22, 1997, the employee began working as a general laborer for Boyd Construction, a company owned by his son. The work was initially subcontracted, and the employee worked part-time for $8.00 an hour. When he did not obtain other work, the employee discussed the need for a more regular income with his son, and after March 1997, was paid $6.00 per hour for a guaranteed 40-hour week. The employee continued to work as a general laborer for his son through the date of hearing. (T. 67-74; Exhs. J, K.)

The matter came on for hearing before a compensation judge at the Office of Administrative hearings on July 31, 1997. The employer and insurer admitted that the employee had work-related bilateral carpal tunnel syndrome, and the parties stipulated that the employee's average weekly wage on the date of injury, September 16, 1994, was $915.64. The compensation judge held that the employee had failed to prove that his left arm osteoarthritis and ulnar neuropathy or his left thumb condition was causally related to his employment, and denied the employee's claims for permanent partial disability and medical expenses for lack of a causal relationship. The judge further concluded that the employee's job as a laborer for his son was a sham or so significantly below the employee's earning capacity that it could not serve as the basis for temporary partial disability benefits. The judge also found, in the alternative, that the employee's actual earning capacity was $12.00 an hour for a 40-hour work week, based on the truck driving job offered by the employer on December 20, 1996. In his order, the compensation judge dismissed, in its entirety, the employee's claim for temporary partial disability benefits. The employee appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, this court 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(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, they are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 37 W.C.D. 235 (Minn. 1984). Where the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

Causation

The employee asserts that he proved by a preponderance of the evidence that his left elbow osteoarthritis, left ulnar neuropathy, and left thumb ligament tear were causally related to his work. It is not this court's role, however, to re-weigh the evidence. Rather, this court may reverse the compensation judge's decision only where 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(3).

In reaching his decision, the compensation judge adopted the opinions of the IME, Dr. Chris Tountas, and rejected those of the employee's treating physician, Dr. Paul Donahue. (Finding 7; Mem. at 16.) Both doctors agreed that the employee suffered from a severe left arm ulnar neuropathy originating in the employee's left elbow. Both also agreed that the employee had significant osteoarthritis in both elbows. (Exh. A; Exh. 8: Dep. Exhs. 1, 2; Exh. 8 at 11.) Dr. Tountas, however, believed that the employee's left ulnar neuropathy was solely the result of the employee's osteoarthritis. He further opined that the employee's underlying osteoarthritis was idiopathic and was not a result of the employee's work activities. Dr. Tountas specifically disagreed with, and did not accept, Dr. Donahue's opinion that an alleged fall off a bucket while on a project in Duluth in 1991 or 1992 had caused or contributed to the employee's ulnar neuropathy, and rejected Dr. Donahue's opinion that the employee's work activities as a painter had aggravated or accelerated the employee's left elbow osteoarthritis. (Exh. A: 9/16/94, 11/14/94 [PT notes], 3/19/97 report; Exh. 8: Dep. Exhs. 1, 2, 3; Exh. 8 at 22-24, 26-27, 29-33, 50.)

The compensation judge also accepted Dr. Tountas's diagnosis of a nonwork-related tear of the ulnar ligament of the left thumb. (Finding 7, pp. 6-7.) Dr. Donahue believed that

the employee's left thumb instability was related to, and was a result of, the atrophy of the intrinsic muscles in the employee's left hand due to his ulnar neuropathy. Dr. Tountas disagreed, opining that the employee's left thumb condition could only have been caused by a fall, landing with the thumb outstretched, and that such an injury could not have been caused by the employee's work activities. (Exh. A: 10/11/95, 5/10/96, 3/19/97 report; Exh. 8: Dep. Exh. 3; Exh. 8 at 34-36.)

Resolution of a conflict between medical expert opinions is the function of the trier of fact. A decision resting on the compensation judge's choice of medical experts may not be reversed by this court so long as there is sufficient foundation for the expert's opinion. See Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The employee does not argue that Dr. Tountas's opinion lacks foundation, but merely argues that the compensation judge should have accepted the employee's testimony and the opinions of his treating doctor instead.

We acknowledge that there is evidence to support the employee's claim. However, [t]he point is not whether [this court] might have viewed the evidence differently, but whether the findings of the compensation judge are supported by evidence that a reasonable mind might accept as adequate. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988). While we do not agree completely with the compensation judge's multiple paragraph finding on this issue, we believe that there is substantial evidence to support his ultimate determination that the employee's left arm osteoarthritis, ulnar neuropathy, and left thumb instability were not work-related. We must, therefore, affirm his denial of the employee's claims for permanent partial disability and medical expenses related to these conditions. Minn. Stat. § 176.421, subd. 1(3).

Temporary Partial Disability

The employee contends that the compensation judge erred in failing to award temporary partial disability benefits to the employee based either on his actual, post-injury wages at Boyd Construction, or on an imputed earning capacity of $12.00 an hour based on the truck driving job offered by the employer on December 20, 1996. The employee has admitted, work-related carpal tunnel syndrome in both wrists. (Finding 1.) There is no dispute that he has significant restrictions limiting the use of his hands due to both his work and nonwork-related injuries. Both Dr. Donahue and Dr. Tountas agreed that, given his physical limitations, the employee could not return to his pre-injury work as a commercial painter. (Exh. A: 11/9/94, 11/30/94, 1/3/95, 9/5/95, 6/12/96 [PT report]; Exh. I; Exh. 8: Dep. Exh. 2; Exh. 8 at 42-43, 47.)

Following the culmination of his injury on September 16, 1994, the employee began working as a superintendent for the employer. There is no dispute that this job was both physically and economically suitable. The employee remained in this position until December 20, 1996, when he was dismissed from his position as a superintendent due to the employer's dissatisfaction with his job performance. On that same date, the employer offered the employee two alternative positions: a modified job as a painter and a job as a truck driver for the employer at a wage loss. (See EE's Br. at 4-5; EE's trial memorandum at 7-8.)

The parties dispute the circumstances surrounding the employee's acceptance of the truck driver job and his failure to return to work in that position. The employee testified that he was told, on December 20, 1996 and thereafter, that he needed to get written restrictions from his doctor. He further testified that it was his understanding that, although Dr. Donahue thought the employee could do the truck driving job, the doctor wanted the employee to get a functional capacities assessment before providing written work restrictions. (T. 56-57, 59-65, 141-45; Exh. C.) Kelly Peifer testified, on the other hand, that she did not ask for written restrictions until January 13, 1997, when the employee informed her that now I have restrictions. (T. 217-18.) She further testified that she had expected the employee to return to work on January 7, 1997 and that the employee's failure to show up for work after that date was considered an unexcused absence. (T. 213-18; Exh. H.) At its best, it is clear that there were misunderstandings and a lack of clear communication between the parties regarding the truck driving job. At its worst, the facts could be interpreted as manipulation of the situation by either the employer or the employee. The result was that the truck driver position was offered to someone else on January 15, 1997, and the employee lost his job with the employer.

The employer and insurer, on appeal and at the hearing below, made two primary arguments with respect to the employee's entitlement to temporary partial disability benefits. First, that the employee refused a suitable job within the meaning of Minn. Stat. § 176.101, subd. 3e, and was disqualified from further workers' compensation benefits. And second, that the employee's earnings at Boyd Construction did not represent his true earning capacity, and that the employee is entitled only to temporary partial disability based on an imputed wage of $480.00 a week based on the $12.00 an hour truck driving job offered by the employer.

The compensation judge properly held that the employee's refusal of the truck driving job offered by the employer on December 20, 1996 did not bar the employee from further temporary partial benefits pursuant to Minn. Stat. § 176.101, subd. 3n. (Finding 11, p. 11; Finding 12, p. 13.) According to Dr. Donahue, the employee reached MMI as of July 17, 1996. A copy of Dr. Donahue's report was served on the employee and his attorney on July 26, 1996. (Exh. A: 7/17 /96; Exh. 1.) Ninety days after MMI would have been reached by October 26, 1996. Subdivision 3n disqualifies an employee from future temporary partial disability benefits only for refusal of a subdivision 3e suitable job offer, that is, one made prior to the end of the 90-day MMI period. Minn. Stat. § 176.101, subds. 3e, 3n. Thus, the compensation judge properly found that the employee was not automatically disqualified from future temporary partial disability benefits for refusal of a suitable job, and we affirm.

We note, however, that although the evidence presented in this case is clearly susceptible to differing interpretations, there is substantial evidence to support the compensation judge's determination that the employee consciously frustrated a return to work in the light-duty, truck driving position offered by the employer. (See, e.g., testimony of Kelli Peifer, T. 211-20.) Having, as a consequence, lost his employment with the employer, the employee began looking for other employment, primarily in the painting field and as a delivery truck driver. (T. 67-68, 72-74; Exh. K.) The employee was without income, and on January 22, 1997, began working part-time, as a general laborer for Boyd Construction, a company owned by his son. The pay stubs

identified, and offered into evidence, by the employee (Exh. J) show earnings of approximately $140.00 a week for the first two weeks, $136.00 a week for the second two weeks, and $114.00 per week for the next four weeks. Having obtained no other employment, the employee testified that in March 1997, he discussed his need for a more regular income with his son, and his son agreed to provide a guaranteed 40 hours a week paying $6.00 per hour, or $240.00 a week. The employee continued to work for his son through the date of the hearing. (Finding 13, p. 12; T. 69-71.)

The employer and insurer argued that the hourly wage paid by Boyd Construction was so low as to suggest collusion between the employee and his son for the purposes of maximizing the amount of temporary partial recoverable by the employee. The compensation judge, apparently accepting this argument, concluded that the job was a sham and was so significantly below the employee's earning capacity that it could not serve as the basis for the payment of temporary partial disability benefits. The judge apparently concluded that the employee was not, therefore, entitled to any wage loss benefits, citing Deschampe v. Arrowhead Tree Service, 43 W.C.D. 641 (W.C.C.A. 1990), *rev'd* 463 N.W.2d 900, 43 W.C.D. 641 (Minn. 1990) and Herrly v. Walser Buick, No. *[redacted to remove Social Security Number]* (W.C.C.A. July 15, 1988). (Finding 13, p. 12.) However, the judge also held in an alternative finding that the employee's actual earning capacity was that represented by the truck driving job offered by the employer, and that the employee's temporary partial disability claim would be allowed . . . on the basis of the difference between his pre-injury wage and his imputed wage of $480.00 per week. (Finding 13, p. 13.)

We do not believe that the facts in this matter exemplify the kind of circumstances represented by the Herrly and Deschampe cases. In each of these cases, the employee was denied temporary partial disability benefits based on a determination that the work involved and the employee's earnings were so insubstantial as to represent no job at all. In Herrly, the employee cared for his parent's house during the winter months, six or seven hours *per week*, earning $200.00 *a month.* In Deschampe, the employee worked in a laundromat, with the assistance of a job coach, for a total of 18 hours over a three week period in December 1987 making $4.00 per hour. Here, the employee began working for Boyd Construction shortly after losing his job with the employer and continued to work for the company through the date of the hearing. The employee testified that, since the end of March 1997, he had worked an average of 30 to 40 hours a week, and was paid a *weekly wage* of $240.00 or about $1,040.00 a month. (T. 69-72.) While the employee's hourly wage may be suspect, the employer and insurer presented no evidence to rebut the employee's testimony and exhibits establishing his employment as a laborer with, and his wages from, Boyd Construction.

Generally, when a disabled employee is released to return to work and obtains a full-time job, the actual earnings from his or her employment create a presumption of earning capacity. Einberger v. 3M Co., 41 W.C.D. 727, 735 (W.C.C.A. 1989); see Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 314 (1960). This presumption can be rebutted by evidence that the employee's ability to earn is greater than the amount represented by his current wages. In appropriate circumstances, evidence of a higher-paying job offered to the

employee, but refused, may be considered in determining the employee's post-injury earning capacity for the purpose of calculating temporary partial disability benefits. Einberger, 41 W.C.D. at 735-36; see also Herrly v. Walser Buick, 46 W.C.D. 530, 536-38 (W.C.C.A. 1992).

Here, the employer offered the employee a job driving truck, paying $12.00 an hour, or $480.00 a week for a 40 hour a week. Although he accepted the job, the employee did not return to work on the date agreed, and, as a consequence, the job was offered to someone else. The judge clearly concluded that the job was physically suitable, a determination that is adequately supported by the record. On these facts, the compensation judge reasonably concluded that the employer and insurer rebutted the presumption of earning capacity, and properly found that the employee was entitled to temporary partial disability benefits based on the wages offered by the employer for the truck driving job, rather than the employee's actual wages at Boyd Construction.

In his order, however, the compensation judge denied the employee's claim for temporary partial disability benefits in its entirety. In these unusual circumstances, we reverse order 1, to that extent, and modify the findings and order to award temporary partial disability benefits based on an imputed wage of $480.00 per week.