

CHARLES W. BRANTL, Employee, v. KENDRICK ELECTRIC, INC., and FEDERATED MUT. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 18, 1998

HEADNOTES

TEMPORARY PARTIAL DISABILITY; EARNING CAPACITY. The employee had proven entitlement to temporary partial disability benefits based on his self-employment earnings where the employer and insurer had agreed to the employee's self-employment as an electrician and the employee could not perform his prior job or keep a regular schedule which would be required by other electrical contractors.

EARNING CAPACITY. The employee had adequately proven the amount of his earnings from self-employment using his tax returns, and the deductions taken on the employee's returns were shown to be proper business deductions, with the possible exception of personal vehicle expenses not addressed by the compensation judge. Therefore, that issue is remanded to the compensation judge for determination of whether these expenses should be excluded as deductions in calculating the employee's income from self-employment.

PRACTICE & PROCEDURE. Remand for consideration of the employee's requested substitution of a revised exhibit and correction made after the Findings & Order had been appealed.

MEDICAL TREATMENT & EXPENSE--CHIROPRACTIC TREATMENT. Substantial evidence supports the compensation judge's finding that the employee's chiropractic treatment was reasonable and necessary.

Affirmed and remanded.

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

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal the compensation judge's findings that the employee is entitled to temporary partial disability benefits, that the employee's earnings from self-employment accurately reflected his earning capacity, and that the employee's chiropractic treatment was reasonable and necessary. We affirm and remand.

BACKGROUND

On September 24, 1979, Charles W. Brantl (employee) sustained an admitted work-related low back injury while working as an electrician for Kendrick Electric, Inc. (employer), which was insured for workers' compensation liability by Federated Mutual Insurance Company (insurer). The employee was paid temporary total disability through March 21, 1981, and 5% permanent partial disability. The employer and insurer also paid medical expenses. The employee attempted to return to work with his employer after the injury, but was unable to perform his previous job. In February 1981, the employee was given restrictions by Dr. Charles Ray, a senior neurosurgeon at Sister Kenny Institute, of no lifting over 25 pounds and limited bending, stooping, squatting, crawling, crouching, and reaching over shoulder level. Dr. Ray opined that the employee would not be able to return to work as an electrician. The employee began working with QRC Nicky Stubbe. (Employee's Exh. I.) The employee performed a job search in the electrical field, but was unsuccessful. The parties then reached a settlement where the employer and insurer paid the employee a lump sum to start his own electrical contracting business. The stipulation for settlement called for a \$10,000 payment as a compromise of the employee's potential claim for temporary total disability and/or temporary partial disability benefits from April 25, 1981, through July 2, 1983. The stipulation specifically left open any future claims for temporary total disability benefits or temporary partial disability benefits after July 2, 1983, claims for permanent partial disability over that already paid, and medical expenses. An award on stipulation was served and filed on May 22, 1981.

After the injury, the employee received chiropractic treatment from Wilma Behm, D.C. The employee was treated infrequently over the years: six treatments from January 16, 1980, through January 28, 1980; one treatment on May 16, 1980; two treatments from June 7, 1982, through June 9, 1982; two treatments from April 25, 1986, through April 28, 1986; four treatments from March 23, 1987, through March 30, 1987; three treatments from October 23, 1987, through October 26, 1987; and five treatments from June 27, 1988, through July 16, 1988. (Employee's Exh. B.) The employee was then referred to Paul Lemke, D.C. The employee was treated ten times from May 18, 1990, through June 6, 1990; six times from October 29, 1990, through November 15, 1990; four times from July 26, 1991, through August 2, 1991; four times from March 23, 1992, through May 6, 1992; and 38 times from March 23, 1994, through August 5, 1994. (Employee's Exh. G.) The employee testified that the chiropractic treatments reduced his low back pain and his left leg pain, and increased his mobility in his back. (T. 23.) The employee testified that it generally took five to seven treatments for his back to improve, based on his past experience. The employee also testified that Dr. Lemke had given him restrictions of no lifting over 15 pounds and to avoid repetitive bending, twisting, and reaching. (T. 26-27.)

On September 27, 1994, the employee underwent an independent medical examination (IME) with Mary Forte, R.N., D.C. She recommended that the employee's chiropractic care be terminated and that the employee be referred to physical therapy and to a psychologist, and then be re-examined. The employer and insurer stopped paying for the employee's chiropractic treatment based on the IME report, but the employee continued to treat with Dr. Lemke. The insurer did not pay for six treatments from July 22, 1994, through August 5,

1994, which were before the independent medical examination; four treatments from January 20, 1997, through January 31, 1997; and three treatments from June 20, 1997, through June 23, 1997.

On October 23, 1996, the employee filed a claim petition for payment of his chiropractic expenses and for temporary partial disability benefits from July 3, 1983, through the present and continuing. The employee indicated that he was unaware that he had a claim for temporary partial disability benefits until he consulted an attorney concerning his chiropractic treatment. On January 9, 1997, the employee underwent an independent medical examination with Dr. Paul Cederberg. Dr. Cederberg opined that the employee would have restrictions of no lifting over 35 pounds, minimize repetitive bending or twisting, and sit or stand as needed. (Employer and insurer's Exh. 1.) A hearing was held on July 2, 1997. At the hearing, the parties stipulated that the employee's weekly wage at the time of injury was \$450.00. (T. 7.) The compensation judge found that the employee's chiropractic treatment was reasonable and necessary, and also awarded temporary partial disability benefits as claimed by the employee. This appeal followed.

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 Benefits

The employee claimed temporary partial disability benefits based on his earnings from self-employment. 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 the work-related disability. See Morehouse v. George A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981) (citing 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 employer and insurer argue that the employee has not sustained an actual loss of earning capacity as a result of his work injury while being self-employed, and that he has

failed to prove the amount of his post-injury earnings for the purpose of determining the amount of temporary partial disability benefits.

Earning Capacity

An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101, subd. 2(a). "[T]emporary partial benefit awards are generally based on post-injury wages because post-injury wages are presumptively representative of an employee's reduced earning capacity. In appropriate circumstances, however, this presumption can be rebutted with evidence indicating that employee's ability to earn is different than the post-injury wage." Einberger v. 3M Co., 41 W.C.D. 727, 739 (W.C.C.A. 1989) (citation omitted). A determination of earning capacity is a factual decision for the compensation judge. Noll v. Ceco Corp., 42 W.C.D. 553, 557 (W.C.C.A. 1989).

The employer and insurer argue that the employee's post-injury earnings from self-employment are not an accurate reflection of his earning capacity because the employee did not perform a diligent job search for work with other electrical contractors. The employer and insurer presented evidence of electrical contractors in the area who pay more than what the employee was earning at the time of the injury, and had jobs available. Evidence of a diligent job search, however, is not a legal prerequisite to an award of temporary partial disability benefits, but is instead one of several factors that may be considered by a compensation judge in determining whether the employee has sustained a wage loss that is causally related to the work injury. Nolan v. Sidal Realty Co., 53 W.C.D. 388, 394 (W.C.C.A. 1995) (citing Johnson v. Axel Ohman, 48 W.C.D. 198 (W.C.C.A. 1992), summarily aff'd (Minn. March 2, 1993)). Further, the employee had attempted to return to his prior job and had performed a job search after he was injured, but he was not able to physically perform his prior job and was not able to find work in the electrical field which he could perform within his restrictions. The employee testified that he was not physically able to work at the pace and level required to work for contractors, that the only way he could do electrical work was through self-employment where he could work at his own pace and schedule the workload according to his physical capability, and that he averaged 15 to 30 hours of work per week. (T. 128.) The employer and insurer conceded that the employee had some physical limitations, but disputed the extent of those limitations. The compensation judge accepted Dr. Ray's and Dr. Lemke's restrictions that the employee should avoid lifting and carrying anything over 15 pounds, and also avoid repetitive bending, twisting, or reaching. There was no evidence that the employee's condition had significantly improved from the time of the settlement. The employee testified that his condition has remained the same. (T. 134.) The compensation judge found that the employee would not be able to keep up with an electrical contractor, which was the reason that the employee had become self-employed in the first place. The employee is not disqualified from receiving temporary partial disability benefits in this case based on the lack of a diligent job search.

Further, the employer and insurer argue that the employee's rehabilitation plan called for the employee to employ apprentices to do the work while the employee supervised, and

that the employee failed to cooperate with the rehabilitation plan by not continuing to employ apprentices in his business as he did at the beginning. As the employee notes, the parties did not enter into a rehabilitation plan; the employer and insurer claim that such a rehabilitation plan can be inferred from the record as a whole. The employee testified that initially he had hired apprentices, but that he was required to directly supervise any work done by apprentices and that he could not maintain a work schedule that was adequate to support the apprentices. (T. 149.) The compensation judge could reasonably conclude that the employee did not fail to cooperate with any established rehabilitation plan, and therefore that the employee was entitled to temporary partial disability benefits based on his earnings from self-employment. We affirm.

Amount of Earnings

The employee based the amount claimed for temporary partial disability benefits on his earnings from self-employment as indicated by his yearly tax returns. The employee and insurer claim that the employee has failed to accurately establish his actual earnings from his self-employment for the purpose of calculating his temporary partial disability benefits, arguing that the employee's tax documentation records do not specify whether certain expenses are business or personal, that the employee made inappropriate personal expenses on his tax returns, and therefore that his tax returns do not accurately reflect his earnings. The employee's tax records include checks made out to businesses that sell a variety of goods to the general public; the employer and insurer argue that these payments could include personal expenses. The employer and insurer also claim that the employee's tax returns include other deductions for various personal expenses.¹ The employee and his tax advisor testified regarding various disputed items and gave explanations for why they were considered business expenses. The employee also testified that he did not intermix personal expenses with business expenses. (T. 64.) The determination of whether the disputed expenses were reasonable business deductions was a fact question for the compensation judge. The compensation judge specifically found the employee to be a very credible and honest witness. Assessment of the credibility of a witness is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., P.A., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988). A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989). The compensation judge accepted the employee's evidence and reasonably concluded that these disputed expenses were for business purposes. Therefore, we affirm the compensation judge's denial of the employer and insurer's request to exclude these expenses as deductions in determining the employee's income.

The employee took depreciation expenses as business deductions on his tax returns. The employer and insurer argue that the employee's depreciation expenses as deducted on his tax returns should be excluded in determining earnings for the temporary partial disability calculation

¹ We note that in their brief, the employer and insurer have pointed out specific items that they claim to be personal expenses but were not argued to, nor determined by, the compensation judge. Therefore, we will not address these items on appeal.

since the tax code allows depreciation more quickly than the actual useful life of the asset. The employer and insurer alternatively argue that the employee's depreciation expenses should be spread over a longer period of time, instead of using the depreciation method on the employee's tax returns, in order to accurately reflect the depreciation expense. In this case, the compensation judge concluded that "a depreciation deduction is a reasonable way to account for expenses incurred by a self-employed individual for the purchase of equipment to be used by the business for the generation of income, which equipment will eventually wear out and need to be replaced." (Memo. at 6.) This court has acknowledged that the depreciation method is not precisely accurate, but concluded that "in the final analysis the depreciation method is the most fair and reasonable method of arriving at earning capacity for a self-employed person" in cases where the useful life or prospective salvage value of the depreciated item is difficult to determine. Hamilton v. GMW Trucking, 42 W.C.D. 257, 262 (W.C.C.A. 1989) (determination of the employee's post-injury earnings from self-employment), summarily aff'd (Minn. Sept. 27, 1989); see also Gilles v. S.B. Foot Tanning Co., 48 W.C.D. 183 (W.C.C.A. 1992). Therefore, depreciation deductions from employment income in determining post-injury earning capacity are appropriate, provided there is evidence that the amount claimed is an accurate reflection of depreciation. The employer and insurer offer no other reason for, or method of, determining a different useful life for the assets in this case. This determination was a fact question for the compensation judge, and the compensation judge could reasonably conclude that the depreciation method used was appropriate in this case and did not result in an understatement of the employee's income. See Hackenmiller v. Ken's Installation, File No. [redacted to remove social security number] (W.C.C.A. Jan. 9, 1992) (court rejected employee's argument that business equipment should be depreciated over its useful life, but agreed that an accelerated deduction was not accurate, and modified the compensation judge's wage finding using a straight-line depreciation method). Substantial evidence supports the compensation judge's finding that the depreciation deductions were proper and that the employee's tax returns were a proper measure of the employee's post-injury earnings. Accordingly, we affirm.

The employer and insurer claim that the compensation judge erroneously allowed the employee to deduct real estate investments as business deductions. The employee testified that he purchased a building to use as storage for the business in 1989. At that time, the employee's business was incorporated. The employee purchased the building as an individual, and the business leased the building from the employee. The monthly lease payments of \$400.00 were the same amount that the employee paid each month to finance the building. The employer and insurer's tax expert opined that the employee's business did not require such a building and that the employee's purchase of the building was instead a real estate investment. The compensation judge rejected this opinion, and accepted the employee's testimony that the purchase of the building and the financing arrangement were reasonable business decisions. Substantial evidence supports this conclusion, and we affirm.

Tax preparation fees paid to the employee's tax advisor, James Speiker, were also at issue at the hearing. The employer and insurer argue that the compensation judge erred by allowing deductions for tax preparation fees for personal tax returns. The employer and insurer's tax expert, Richard Poston, opined that some of the fees paid to Mr. Speiker were for personal tax

returns. Mr. Speiker testified by deposition that the fees listed were for business expenses. (Employee's Exh. AA, Deposition of James Speiker dated June 23, 1997.) The compensation judge accepted Mr. Speiker's testimony and concluded that Mr. Poston was speculating that these fees were for personal expenses. Substantial evidence supports the compensation judge's finding that these fees were appropriate business deductions.

At the hearing, there also were several issues regarding the employee's use of his personal vehicles for business purposes and corresponding tax deductions. The employee took mileage deductions for using his personal vehicles for business purposes in several years, which the compensation judge found was appropriate. The employer and insurer did not address these expenses in their brief, and are not at issue in this appeal. The employer and insurer also questioned the employee's purchase of a personal vehicle with a check from his business account that was taken as a business expense on the employee's tax return in 1984, and also payments for repair and maintenance expenses on personal vehicles that were taken as business expenses over several years. The employee testified that he did not pay for personal vehicles expenses as business expenses, but admitted on cross-examination that checks were paid out of his business account for maintenance on a personal vehicle. The employee also conceded that the check for the purchase of the personal vehicle was from his business account, and testified that he had instructed his tax preparer to treat such payments as draws. (T. 112, 142.) The employee's tax returns indicate that these payments were instead deducted as business expenses. The compensation judge did not specifically address these expenses in the Findings and Order. Therefore, we remand to the compensation judge for consideration of whether the employee's temporary partial disability benefits award should be modified to reflect the exclusion of the payment for purchasing a personal vehicle and payment for any repair and maintenance expenses for personal vehicles as deductions in the calculation of the employee's income.

The compensation judge awarded temporary partial disability benefits as listed in Employee's Exhibit BB, based on a weekly wage of \$400.00. At the hearing, the parties indicated that they had stipulated that the employee's weekly wage was \$450.00 on the date of the employee's work injury. (T. 7.) After the hearing, the employee provided a revised Exhibit BB based on the stipulated weekly wage of \$450.00. The compensation judge attached the original Exhibit BB to the September 2, 1997 Findings and Order. On September 5, 1997, the employee requested an amended Findings and Order to include the revised Exhibit BB and to correct an apparent typographical error, but the employer and insurer had already filed a notice of appeal on September 4, 1997. Therefore, we also remand to the compensation judge for consideration of the employee's revised Exhibit BB based upon the stipulated wage of \$450.00 and of the apparent typographical error in Finding 5.

Chiropractic Expenses

The employer and insurer also argue that the compensation judge's finding that the employee's claimed chiropractic treatment was reasonable and necessary is not supported by

substantial evidence.² Considerations which may be relevant in determining whether chiropractic services are reasonably required include: evidence of a reasonable treatment plan, documentation of the details of the treatment, the degree and duration of relief resulting from the treatment, whether the frequency of treatment is warranted, the relationship of the treatment to the goal of returning the employee to suitable employment, potential aggravation of underlying conditions, duration of treatment, and cost. Field-Seifert v. Goodhue County, File No. [redacted to remove social security number] (W.C.C.A. Mar. 5, 1990). Other relevant factors include: the employee's testimony concerning the relief obtained; the possibility that other conditions not discovered by the chiropractor may be causing the employee's symptoms; whether treatment is scheduled on a regular or an as needed basis; the use of other health care providers in the event of continuing symptoms; the employee's overall activities and the extent of the employee's ability to work; and the employee's dependence on the treatment. Horst v. Perkins Restaurant, 45 W.C.D. 9, 10-11 (W.C.C.A. 1991), summarily aff'd (Minn. July 10, 1991). "The appropriate factors will vary from case to case, depending upon the unique circumstances of each situation." Fuller v. Naegele/Shivers Trading, File No. [redacted to remove social security number], slip op. at 4 (W.C.C.A. Apr. 14, 1993).

The employer and insurer argue that the employee's condition has not significantly changed from the time of the injury and that the chiropractic treatment has not provided any lasting curative relief. The compensation judge stated:

The employee used Dr. Lemke's care very sparingly. He does his home exercises and wears his lumbar support belt when he does strenuous activities. He only seeks treatment when his symptoms are at their worst and he needs the treatment to continue working. The Compensation Judge finds that the treatment is cost effective. It clearly helps keep the employee working and probably is less expensive than the options set out by Dr. Forte. This employee makes judicious use of the chiropractic treatment and it is clear that he only goes in as needed. There is no psychological addiction to such care and there are no fixed appointments.

(Memo. at 10.) The compensation judge clearly considered the appropriate factors in this case. The employee was only treated for six treatments from July 22, 1994, through August 5, 1994; four treatments from January 20, 1997, through January 31, 1997; and three treatments from June 20, 1997, through June 23, 1997. The employee testified that the treatment improved his function and increased his ability to work. Substantial evidence supports the compensation judge's finding that the employee's chiropractic treatment was reasonable and necessary. Accordingly, we affirm.

² The parties did not raise the issue of the application of the permanent treatment parameters at the hearing or on appeal; therefore we will not consider the application of the parameters in this case.