BRUCE BURGRAFF, Employee, v. HASTINGS BUS CO. and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants, and ORTHOPAEDIC SPORTS, INC. and AUTO-OWNERS INS. CO., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 14, 1998

HEADNOTES

ARISING OUT OF & IN THE COURSE OF - TO AND FROM WORK. Substantial evidence supports a determination that the employee's injury arose out of and in the course of employment where a school bus driver was driving the employer's bus from the termination of his morning route to the terminal where the employee would start his afternoon route.

PERMANENT PARTIAL DISABILITY - SHOULDER. Where the employee sustained an acromioclavicular separation of his shoulder with a resultant surgery; then later developed impingement in the shoulder requiring a second surgery consisting of an acromionectomy and transection of the coracoacromial ligament; the compensation judge reasonably awarded a three percent disability rating under the rules of disability for the shoulder separation and in addition three percent under a Weber rating.

TEMPORARY TOTAL DISABILITY - TEMPORARY PARTIAL DISABILITY. Substantial evidence, including an adequate job search without rehabilitation assistance, supports an award of temporary wage benefits.

MAXIMUM MEDICAL IMPROVEMENT. The acceptance of the treating doctor's opinion of the date of the employee reaching MMI is supported by substantial evidence consisting mainly of the medical records and the employee's symptoms during his treatment.

Affirmed.

Determined by Hefte, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: James R. Otto

OPINION

RICHARD C. HEFTE, Judge

The employer appeals the compensation judge's findings that the employee sustained a personal injury that arose out of and in the course of his employment; that the employee is entitled to temporary total disability and temporary partial disability benefits during the period of time from January 24, 1996 to July 4, 1997; that the employee is entitled to six percent

permanent partial disability; and that the employee reached maximum medical improvement no later than March 31, 1997. We affirm.

BACKGROUND

Bruce Burgraff, (employee) initially commenced work as a school bus driver in 1994. After working as a bus driver for another employer, the employee went to work for Hastings Bus Company, (employer) in 1995, bussing students in south Minneapolis. The employer's terminal was located in Eagan, Minnesota.

As a bus driver, the employee regularly worked a split shift day. The employee began his usual work day at about 6:00 a.m. when he left the employer's terminal. He picked up his first student at approximately 6:20 a.m. He finished his morning route at about 10:00 a.m., and started his afternoon route at 1:30 p.m. His pay period ran from 6:00 a.m. to 10:00 a.m., and then from 1:30 p.m. to 4:30 p.m. each day. Between the employee's daily split shifts, the employee would have his lunch and then would return to the terminal to commence the afternoon shift.

On January 24, 1996, after he finished his morning route, the employee went to his home in St. Paul. He apparently let his dog out of the house, had a cup of coffee and then drove to a McDonald's where he had his lunch. After finishing lunch, as the employee was driving the employer's bus to the employer's terminal in Eagan, he was involved in a motor vehicle accident at Dodd Road and highway I494.

In this vehicular accident the employee injured his left shoulder. He was eventually treated by an orthopedic surgeon, Dr. G. Peter Boyum, who initially diagnosed a grade three acromioclavicular dislocation of the left shoulder with upper back strain. Dr. Boyum performed surgery on the employee's left shoulder on February 29, 1996. The employee was off work until he attempted to return to his job on the first day of school in the fall of 1996. He was unable to perform his job due to the effects of his work injury. With continuing treatment by Dr. Boyum, the employee was diagnosed as having a rotator cuff impingement syndrome in the left shoulder. A second surgery was performed on the employee's left shoulder on October 3, 1996. After extensive physical therapy, Dr. Boyum released the employee to return to work with restrictions in January 1997. Dr. Boyum told the employee he could try driving a bus, but he would not recommend it.

Again, the employee was unable to perform his bus driving job. Thereafter he found work at two short-term jobs, the last job which ended on July 4, 1997. When the employee's claim came on for hearing in September 4, 1997, the employee was unemployed. The compensation judge, following a hearing, found that the employee's injury of January 24, 1996, arose out of and in the course of his employment; that the employee reached maximum medical improvement (MMI) no later than March 31, 1997; and that the employee was entitled to certain temporary total and temporary partial disability benefits prior to July 4, 1997. The compensation judge also found that the employee sustained a three percent permanent partial disability rating

pursuant to Minn. R. 5223.0450, subp. 2A(3) as well as an additional three percent permanent partial disability pursuant to the Weber decision and Minn. Stat. § 176.105 (1)(c). The employer and insurer appeal.

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

Arising Out Of/Course of Employment

Every employer . . . is liable to pay compensation in every case of personal injury or death of an employee arising out of and in the course of employment. Minn. Stat. § 176.021, subd. 1 (1992). A personal injury is an injury sustained while the employee is engaged in, on, or about the premises where the employee's services require the employee's presence as a part of such service at the time of the injury and during the hours of such service. Minn. Stat. § 176.011, subd. 16 (1992). Thus, the phrase arising out of requires evidence of a causal connection between the injury and the employment, while the phrase in the course of employment requires that the injury occur within the time and space boundaries of employment. Foley v. Honeywell, Inc., 488 N.W.2d 268, 271-72 (Minn. 1992) (citing Gibberd v. Control Data Corp., 424 N.W.2d 776, 780, 40 W.C.D. 1040, 1047 (Minn. 1988). Whether an injury arose out of and in the course of employment is generally a question of fact for the compensation judge, Franze v. Nat'l Delivery Serv., 49 W.C.D. 148, 155 (W.C.C.A. 1993), summarily aff'd (Minn. August 25, 1993), and the burden of proof is on the employee/claimant. Minn. Stat. § 176.021, subd. 1.

As a general rule, injuries sustained while commuting to and from work are not compensable under the Minnesota Workers' Compensation Act. See, e.g., Swanson v. Fairway Foods, 439 N.W.2d 772, 41 W.C.D. 1010 (Minn. 1989). There are, however, numerous exceptions to the general going and coming rule. An exception to the general going and coming rule is made for an employee who is traveling between two portions of the employee's work

premises. See 1 Arthur Larson, Workers' Compensation Law § 15.14(a); Kahn v. State of Minnesota, 289 N.W.2d 737, 742, 32 W.C.D. 351, 360 (Minn. 1980). In the present case, the employee Burgraff had finished his first bus route, and after having his noon meal, he was driving the employer's school bus back to the terminal in Eagan to check in for his afternoon shift. While at the terminal the employee would initial his worksheet as to when he returned with the bus during the noon hour, and would initial his worksheet when he left for his afternoon shift. Also, when he returned with the bus at the end of the second shift, he would initial the worksheet at the employer's bus terminal.

The employer and insurer maintain that the compensation judge erred by referencing a part of subdivision 16 of Minn. Stat. § 176.011 in determining that the employee on January 24, 1996, sustained a personal injury that arose out of and in the course of employment for the employer. This part of subdivision 16 states: [w]here the employer regularly furnished transportation to employees to and from the place of employment, those employee are subject to this chapter while so being transported. The case of McConville v. City of St. Paul, 528 N.W.2d 230 (Minn. 1995) indicates that under the part of subdivision 16 referenced herein, the exclusion from workers' compensation coverage applicable while the employee is voluntarily participating in employer-sponsored recreational activities (see Minn. Stat. ' 176.021, subd. 9) does not apply if the injury occurs while the employee, as a passenger, is being transported by the employer. The employer and insurer in light of McConville maintain that the employee was not in course of employment when the employee was injured on January 24, 1996, as the employee was not a passenger being furnished regular transportation, but was driving the bus which was not under the employer's control. We do not make our decision applying this part of subdivision 16, but rather affirm based on other reasons.

The employer and insurer also argue that the employee was injured at a time when he was not working and when he was not being paid. An injury is said to arise in the course of employment when it takes place within the period of the employment, and at a place where the employee reasonably may be, and while the employee is fulfilling work duties or engaging in something incidental thereto. Larson, supra. § 14. An employee is in the course of employment when the employee does those reasonable things which his contact with his employment expressly or impliedly permits him to do. Fjeld v. Marshall County Co-op Oil Ass'n, 227 Minn. 274, 35 N.W.2d 448, 451 (1949). After finishing his morning bus route, the employee went to his house where he let his dog out and had a cup of coffee. Then he went to eat lunch at McDonald's which was basically on a route one would travel from the end of the employee's morning bus route to the employer's terminal. The trip to the employee's home and his eating his lunch at McDonald's were completed when he began driving the bus to the employer's terminal. The case of Raymond v. Osseo-Brooklyn School Bus Co., 463 N.W.2d 510, 43 W.C.D. 582 (Minn. 1990), which is argued by the employer, is distinguishable. In Raymond the employee was denied coverage as the employee drove her bus to her home for her personal convenience and not in performance of any services for her employer; and then was injured falling on her private driveway.

When the employee's accident occurred, the evidence reasonably indicates that the employee was engaged in an activity which was a part of his job and was within the time and space boundaries of his employment. The nature of the employee's daily work required that he drive the employer's bus from the terminus where he finished the morning bus route to the terminal where he would commence his afternoon bus route. When the accident and employee's injury occurred, he was traveling to the employer's terminal. The evidence indicated that a reason for the employee's returning to the employer's terminal was to check in and check out prior to his afternoon bus route. The employer received a benefit from this activity of the employee as the employer would know that the employee had performed and was performing his usual duties. The evidence supports the fact that this activity was required by the employer. At the time of his injury the employee was not engaged in any activity for his personal convenience. It was necessary for the employee as a bus driver to use the employer's bus between the morning and afternoon bus routes in order to complete his total bus route each day. Also, it can reasonably be concluded that the employee's injury was sustained while traveling between two portions of an employer's work premises and is compensable. See Kahn v. State of Minnesota, University of Minnesota, supra.

The decision of the compensation judge that the employee's injury arose out of and in the course of her employment is affirmed.

Permanent Partial Disability Benefits

The employee was awarded six percent permanent impairment of his body based upon the report of Dr. Boyum. Dr. Daly opined that Minn. R. 5223.0450, subp. 2A[1] is the category for the employee's injury and rated the employee as having a three percent permanent partial disability rating. Therefore, the employer and insurer maintain that the employee should only receive, at most, a three percent permanent partial disability rating. However, the compensation judge accepted Dr. Boyum's report. Dr. Boyum gave the employee the same three percent rating that Dr. Daly gave the employee pursuant to Minn. R. 5223.0450, subp. 2A. In addition to this three percent for an acromioclavicular separation, Dr. Boyum determined the employee was also entitled to a three percent permanent partial disability rating when taking into consideration the employee's two surgeries. The first surgery was for the acromioclavicular dislocation and the second surgery followed a new diagnosis of rotator cuff impingement. In the second surgery the doctor excised the posterior and superior labrum and performed an arthroscopic subacromial decompression including partial acromionectomy and transection of the coracoacromial ligament. Following this surgery, the doctor indicated the employee sustained a permanent loss of motion. This additional three percent was given pursuant to a Weber rating and Minn. Stat. § 176.105 (1)(c).[2] Based on substantial evidence, we affirm the compensation judge's determination of the employee's permanent partial disability rating of six percent.

[1] Subdivision 2A rates a grade 3 acromioclavicular separation at three percent permanent partial disability.

[2] Weber v. City of Inver Grove Heights, 43 W.C.D. 471, 461 N.W.2d 918 (1990). Weber

Temporary Total and Temporary Partial Wage Disability Benefits from January 24, 1996 Through July 4, 1997

The employer and insurer maintain that the employee did not conduct a reasonably diligent search for work and therefore is not entitled to wage loss benefits. The employee did search for work; however he did not have the assistance of any rehabilitation services in his job search during the time in question. The employee prepared a resume and mailed them to five or six engineering firms from whom he requested work. He called on approximately a dozen employers personally, some more than on one occasion. The employee found and accepted employment at the Sportsman's Guide on March 3, 1997, for four hours of work per day. He worked at Sportsman's until March 28, 1997, when he went to work at Phalen Park Garden Center which gave him more hours of work per day. The compensation judge reasonably found that after he was released to work with restrictions, and under the circumstances, the employee made a reasonable and diligent effort to find work between January 3, 1997 and July 4, 1997.

And, from March 3, 1997 to July 4, 1997, the employee worked part time, claiming temporary partial disability benefits. The employer and insurer only questions the adequacy of employee's job search in relation to the claim for temporary partial disability benefits. In order to be eligible for temporary partial disability benefits, the employee must show a work-related physical disability, ability to work subject to the disability and a loss in earning capacity that is causally related to the disability. Minn. Stat. § 176.101, subd. 2(b); Morehouse v. Geo. A. Hormel Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981). A job search is just one factor that a compensation judge may consider in determining whether there is, in fact, a reduced earning capacity due to the injury. Nolan v. Sidel, 53 W.C.D. 388 (1995). Considering our affirmance of an adequate job search and the unquestioned evidence of the employee's physical disability and earnings, substantial evidence supports the compensation judge's finding that the employee is entitled to temporary partial disability benefits.

Maximum Medical Improvement (MMI)

In connection with his injuries of January 24, 1996, the employer and insurer contend that MMI was reached pursuant to Dr. Daly's December 12, 1996, report which was served on December 24, 1996. MMI is defined as the date after which no further significant recovery from or significant lasting improvement to a personal injury can reasonably be anticipated, based upon reasonable medical probability. Minn. Stat. § 176.021 (25). However, the compensation judge found that, based on Dr. Boyum's report, the employee reached MMI no later than March 31, 1997. Prior to March of 1997, Dr. Boyum had treated the employee over a 14 month period. His records revealed the employee's complaints and symptoms during

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was essentially codified by the legislature in 1992 Minn. Laws 510. Minn. Stat. § 176.105 (1)(c) states, If an injury for which there is objective medical evidence is not rated by the permanent partial disability schedule, the unrated injury must be assigned and compensated for at the rating for the most similar condition that is rated.

treatment. He reported that the employee had two surgeries and that it was as of March 31, 1997, that he did not anticipate the employee's condition would not worsen with time and he did not anticipate future surgery or treatment. The compensation judge noted that at the time Dr. Daly gave his opinion on MMI he did not have the results of the employee's second surgery. The compensation judge reasonably accepted the MMI report of Dr. Boyum. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). We affirm the finding by the compensation judge as to the date of MMI.