

DAVID R. BURKE, Employee, v. THIELE ENGINEERING CO. and ST. PAUL CO'S,  
Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS  
JANUARY 28, 1998

HEADNOTES

MONITORING PERIOD COMPENSATION; PERMANENT PARTIAL DISABILITY. A permanent partial disability rating is necessary to calculate monitoring period compensation. Where the record does not disclose a clear basis for the judge's finding of permanent partial disability, we reverse and remand for reconsideration and further findings.

Reversed.

Determined by Hefte, J., Wilson, J., and Johnson, J.  
Compensation Judge: John E. Jansen

OPINION

RICHARD C. HEFTE, Judge

The employer and insurer appeal the compensation judge's award of monitoring period benefits. We reverse and remand.

BACKGROUND

On July 1, 1981, David R. Burke (employee) sustained a work-related low back injury while working for Ken's Roofing. In 1988, the employee entered into a stipulation for settlement with Ken's Roofing and its insurer, which apparently included compensation for permanent partial disability. The 1988 stipulation and award were not submitted into evidence at the hearing and are not included in the file or record on appeal. On February 10, 1995, the employee sustained another admitted low back injury while working for Thiele Engineering (employer) which was insured for workers' compensation coverage by St. Paul Companies (insurer). The employee's treating physician was chiropractor Dr. Edward Baldus. Dr. Baldus has recommended permanent restrictions that the employee not lift over 25 pounds and avoid repetitive bending. (Employer and insurer's Exh. 1.) The parties have stipulated that the employee reached maximum medical improvement no later than May 14, 1996. (T. 11.)

The employee initially returned to work with the employer, but the employer could not continue to provide work within his restrictions. On June 20, 1996, the employee began working for Morris Plastics. On February 21, 1997, the employee was laid off from this job due to economic reasons. On March 18, 1997, the employee underwent an independent medical evaluation with Dr. David Boxall. Dr. Boxall diagnosed that the employee had multilevel

degenerative disc disease of the lumbar spine with chronic low back pain. His report indicates that the employee underwent an MRI on July 27, 1995, which showed degenerative disc disease at L4-5 and L5-S1. Dr. Boxall opined that the employee had no ongoing restrictions and that the employee had a preexisting condition dating from 1981 which had been temporarily flared up by the 1995 work injury and had resolved by July 26, 1995. Dr. Boxall did not address whether the employee had sustained any permanent partial disability as a result of the 1995 work injury. (Employer and insurer's Exh. 2.) The employee was unemployed until March 30, 1997, when he found a new job with a different company. Dr. Baldus indicated in a report dated June 3, 1996, that the employee had a 15% permanent partial disability from his 1981 low back injury and that the 1995 work injury caused an additional 10% permanent partial disability. (Employee's Exh. B.)<sup>1</sup> Dr. Baldus' records were not submitted into evidence at the hearing.

On January 29, 1997, the employer and insurer filed a petition to discontinue compensation benefits, alleging that the employee had sabotaged an imminent job offer in June 1996 and therefore had failed to accept a job offer under Minn. Stat. § 176.101, subd. 31, which entitled them to stop paying wage loss and rehabilitation benefits. On February 25, 1997, the employer and insurer served a notice of intention to discontinue benefits to cease paying temporary partial disability benefits because the employee was laid off from Morris Plastics. The employee filed an objection to discontinuance, claiming entitlement to temporary total disability benefits after being laid off. Before the hearing, the employee started working at his new job on March 30, 1997. The matters were consolidated for hearing and a hearing was held on April 8, 1997. At the hearing, the employee claimed that he was entitled to monitoring period compensation after he was laid off until he obtained a new job, from February 23, 1997, through March 30, 1997, and temporary partial disability benefits after that date. The compensation judge found that the employee had not failed to accept a job offer under Minn. Stat. § 176.101, subd. 31 and had not sabotaged a job offer. The compensation judge dismissed the employer and insurer's petition and notice of intention to discontinue benefits, and awarded temporary partial disability after March 30, 1997. The compensation judge also found that the employee had been laid off for economic reasons on February 21, 1997, that he had a 10% permanent partial disability due to the 1995 work injury, and that he was entitled to monitoring period compensation from February 23, 1997, through March 29, 1997. The employer and insurer appeal the award of monitoring period compensation.

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<sup>1</sup> The entire text of Dr. Baldus' June 3, 1996 report:

I have been in practice in Minnesota for 36 years and I don't think that the "Minnesota Rules" do a good job in this case.

Mr. Burke had a 15% permanent partial disability of back from a '81 W. Compensation injury. At the time of the injury on 02/10/95 there were degenerative changes and latent residuals.

I feel the 02/10/95 injury caused an additional 10% permanent partial disability.

## 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

Monitoring period compensation is due when an employee is laid off for economic reasons after reaching maximum medical improvement. Minn. Stat. § 176.101, subd. 3i (repealed effective October 1, 1995);<sup>2</sup> Hankermeyer v. Kloster-Madsen, Inc., 43 W.C.D. 21, 29 (W.C.C.A.

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<sup>2</sup> Minn. Stat. § 176.101, subd. 3i (repealed effective October 1, 1995) provides:

Lay off because of lack of work or released for other than seasonal conditions. (a) If an employee accepts a job under subdivision 3e and begins work at that job and is subsequently unemployed at that job because of economic conditions, other than seasonal conditions, the employee shall receive monitoring period compensation pursuant to clause (b).

...

(b) Upon the employee's initial return to work the monitoring period begins to run. If the employee is unemployed for the reason in clause (a), prior to the end of the monitoring period the employee shall receive monitoring period compensation. This compensation shall be paid until (1) the monitoring period expires, or (2) the sum of monitoring period compensation paid and impairment compensation paid or payable is equal to the amount of economic recovery compensation that would have been paid if that compensation were payable, whichever occurs first. No monitoring period compensation is payable if the unemployment occurs after the expiration of the monitoring period. Monitoring period compensation is payable at the same intervals and at the same rate as when temporary total compensation ceased, provided that the minimum monitoring period compensation rate is 66-2/3 percent of the weekly wage for permanent

1990). Monitoring period compensation is intended to proportionately compensate the employee based on the length of time he worked prior to layoff and the amount of economic recovery compensation to which he would otherwise have been entitled. Id. This compensation is available to those employees who have returned to work at a suitable 3e job and have received a permanent partial disability rating. A rating is necessary in order to establish the monitoring period compensation since monitoring period compensation is payable for the number of weeks a disabled employee would receive economic recovery compensation under § 176.101, subd. 3a, if that benefit were payable. See Minn. Stat. § 176.011, subd. 26 (repealed effective October 1, 1995).

The employer and insurer argue that there is insufficient evidence to support the compensation judge's finding that the employee had sustained a 10% percent permanent partial disability as a result of the 1995 work injury, and therefore that the extent of the employee's entitlement to monitoring period compensation cannot be calculated. Dr. Baldus' report indicates that the employee had sustained an additional 10% permanent partial disability as a result of the 1995 work injury. This report, however, does not indicate the basis for the rating or what rule upon which the rating is based. The report also does not indicate whether the rating is to the back or to the body as a whole. Minn. R. 5223.0390, subp. 3.C(2) provides a 10% permanent partial disability rating for: "Symptoms of pain or stiffness in the region of the lumbar spine, substantiated by persistent objective clinical findings, that is, involuntary muscle tightness in the paralumbar muscles or decreased range of motion in the lumbar spine, and with any radiographic, myelographic, CT scan, or MRI scan abnormality not specifically addressed elsewhere in this part . . . (2) multiple vertebral levels, ten percent." Dr. Baldus' report does not address the rule's requirements. The employer and insurer's independent medical examiner, Dr. Boxall, indicated that the employee had multilevel degenerative changes and that he had an abnormality on an MRI scan. Dr. Boxall indicated, however, that the employee's work injury had only caused a temporary flare up of a pre-existing condition. A finding of permanent partial disability is one of ultimate fact, Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987), but because the record does not disclose a clear basis for the compensation judge's decision, we reverse the judge's finding regarding this rating and the award of monitoring period compensation, and remand for reconsideration and additional findings concerning the employee's permanent partial disability rating. The compensation may take such additional evidence on this issue as deemed necessary.

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partial disability as determined by section 176.011, subdivision 18 and subject to the maximums specified therein.