DENNIS J. CARLSON, Employee, v. NORTHLAND PAPER SUPPLY and STATE FUND MUT. INS. CO., Employer-Insurer/Appellants, and MEDICA CHOICE for HRI and MN DEP'T OF ECON. SEC./VRI, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 8, 1999

No.[REDACTED SSN]

HEADNOTES

PERMANENT PARTIAL DISABILITY - SHOULDER. Where all physicians diagnosed a right shoulder dislocation, the compensation judge properly rated the employee with a three percent permanent partial disability under Minn.R. 5223.0110, subp. 3.B., which provides such a rating in the event of a shoulder dislocation, one occurrence, without surgery, despite the fact that the only physician rating permanency had given a zero percent rating.

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee had sustained a three percent permanent partial disability and, although the employee's doctor had released the employee with no formal restrictions, the doctor advised the employee that the employee would have to self-regulate his work activities, and the where the employee testified that he had to observe self-imposed restrictions on repetitive use of his right arm or over-the-shoulder weight-bearing activities, substantial evidence supported the compensation judge's award of temporary partial disability based upon post-injury reduced earnings.

Affirmed.

Determined by Wilson, J., Pedersen, J., and Wheeler, C.J.
Compensation Judge: Gregory A. Bonovetz

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the awards of permanent partial and temporary partial disability compensation and a rehabilitation consultation. We affirm.

BACKGROUND

The employee, Dennis J. Carlson, is a 48 year old widower. He is right-handed. Following high school the employee attended Hibbing Community College for one year, and went full time to the University of Minnesota for two years. He did not complete a degree. He then worked in a variety of jobs which included residential carpentry construction, driving a forklift for a brewery, and working for the Red Owl Family Center stocking shelves and waiting on customers.

The employee testified that, with the exception of forklift driving, all of these jobs involved either heavy lifting or a substantial degree of over-the-shoulder use of the arms. He began working for the employer, Range Paper Corporation, as a truck driver and warehouseman in 1973. This job also involved a lot of heavy lifting, pushing, pulling and over-the-shoulder work. He sustained an admitted work-related injury to the right shoulder on March 9, 1992, when he experienced a sharp pain in the right shoulder while attempting to tip a 55 gallon barrel of liquid soap onto a two-wheeled handcart. The employee's weekly wage on the date of injury was $360.35. (T. 34-35; Exh. J; Exh. L at 6-7; Findings 2, 4 - 6 [unappealed].)

Immediately following the injury, the employee was unable to continue working and was seen for evaluation by Dr. Jan Dawson at the Adams Clinic later that day. The employee reported that the shoulder had snapped and come out of joint several times since the occurrence. On examination, Dr. Dawson noted tenderness to palpation in the anterior portion of the right shoulder in the region of the long head of the biceps tendon. Crepitation was noted on motion of the shoulder and the shoulder was seen to "sublux," or partially dislocate, anteriorly with force or torque, but it was easily snapped back into place. Dr. Dawson diagnosed intermittent dislocation of the right shoulder. The employee was released from work and placed in a shoulder immobilizer. (Exh. 8 at 398-399.)

The employee returned to Dr. Dawson for a follow-up appointment on March 20, 1992. He reported that he had continued to experience "popping and clicking in the right shoulder with occasional feelings of giving out," but that he was doing better overall. Dr. Dawson noted that the employee's right shoulder was tender to palpation in the subacromial area laterally as well as in the area of the posterior humeral head. Slight crepitation to palpation was noted with lateral traction. Abduction was weak. Dr. Dawson gave tentative approval for the employee to return to work on March 30, 1992, and prescribed range of motion and strengthening exercises. (Exh. 8 at 324.)

The employer and insurer accepted liability for a workers' compensation injury and paid temporary total disability compensation from March 10, 1992 until March 30, 1992, when the employee returned to work for the employer in his pre-injury job at full wages. At some point in the spring of 1992, the employer and insurer also paid the employee permanent partial disability compensation for a three percent whole-body impairment consisting of a shoulder dislocation, single episode, no surgery, pursuant to Minn. R. 5223.0110, subp. 3B. (T. 42; Findings 6, 7 [unappealed].)

The employee again returned to Dr. Dawson on May 12, 1992. The employee reported that he continued to have difficulty with pulling, pushing and overhead activity. He had found it helpful to wear the shoulder immobilizer while working. Dr. Dawson noted full shoulder range of motion on examination but "there [was] weakness to abduction of the right arm" and "some atrophy or decreased muscle mass in the right biceps tendon." Dr. Dawson referred the employee for an orthopedic evaluation to rule out rotator cuff injury. (Exh. 8 at 323.)

The employee underwent an MRI of the right shoulder on May 20, 1992 and was

seen by the orthopedist, Dr. Jay Davenport, on May 21, 1992. Dr. Davenport's notes indicate that the employee "saw Dr. Dawson who x-rayed him, put him in a sling for about 3 weeks, was out of the sling and tried to work and he developed pain in his shoulder and was put back in the sling. The shoulder has not dislocated or subluxed since he has been out of the sling, but it has been painful and it makes a lot of popping sounds." The MRI scan showed no evidence of a rotator cuff tear. Crepitus and tenderness was present on examination, along with significant discomfort with extreme adduction and external rotation, and resistance to abduction and flexion. Dr. Davenport agreed that the employee had "probably subluxed his shoulder." He recommended physical therapy, icing of the shoulder, and exercises for three weeks. The employee was authorized to continue working, but was advised to avoid any pain-provoking activities. (Exh. 8 at 603-604.)

Following the physical therapy, the employee returned to Dr. Davenport and reported that although he still had some noises in his shoulder, he was doing better and noticed improved strength. Full range of motion was present, although elevation strength was somewhat diminished. The employee was instructed to continue home exercises and return in six weeks. Dr. Davenport noted that the employee "is at work without restrictions." On July 23, 1992 the employee returned in follow-up to Dr. Davenport again reporting improvement, specifically less discomfort, better strength and less cracking and snapping, although the employee still felt that there was some weakness in the arm and shoulder and was noticing discomfort towards the end of the work week. On examination some discomfort was reported with heavy resistance to abduction and flexion. The employee thought that his shoulder was working adequately for him although not at 100 percent. He was released from further follow-up, but advised to return if he experienced an increase in his symptoms. (Exh. 8 at 602.)

The employee's condition plateaued in the summer of 1992, although he continued to experience pain and weakness in the right shoulder, especially with overuse or raising above shoulder level. The employee reached maximum medical improvement effective on November 6, 1992 with the service of Dr. Davenport's October 6, 1992 maximum medical improvement report. In the October 6, 1992 report, Dr. Davenport provided a final diagnosis of subluxation of the right glenohumeral joint, but rated permanency at zero percent. (Findings 10, 11, 13 [unappealed]; Exhs. 4, 5.)

The employee continued to work for the employer in his full-time pre-injury job until he was laid off by the employer in January 1994. According to the employee's testimony, he performed the work under self-imposed restrictions of avoiding the lifting or carrying of heavy objects, especially over the shoulder or above the head. Because he found it painful to raise his right arm overhead, he restricted himself from repetitive use of the arm in that position. Thus, he testified, he refused to reach above head level to remove or restock cases of merchandise on shelves, asking other workers to do this. Because he found it painful to lift over 50 pounds, he made more use of a two-wheeled handcart to move smaller barrels, pails and cases. He also observed these restrictions in his non-work activities. The employee continued to have pain in his right shoulder at work but was able to do the work with these self-imposed restrictions. (T. 28-30, 32, 45; Exh. L at 16-17, 35-36, 43.)

After the January 1994 layoff by the employer, the employee initially collected unemployment benefits before actively looking for other work. Initially he limited his job search to driving jobs paying at least $9.00 per hour, but lowered his expectations when he did not find such work. He testified that, throughout his job search activities after the 1994 layoff by the employer, he limited his job search to work which would not involve heavy lifting or repetitive use of or lifting by his right arm above shoulder level. He believed that these limitations ruled out construction work. He found temporary work driving forklifts on April 30, 1995, but was laid off on July 22, 1995. Next, he held a short-term job for a few days in January 1996 for Pierson Drywall driving a truck to haul scrap sheetrock to a landfill. He found and began a part-time janitorial job dusting, vacuuming and cleaning toilets for employer Pride of Minnesota beginning July 1, 1996. He was terminated from Pride of Minnesota in early January 1997. He next collected unemployment compensation and then worked for about a week in a part-time job as a home aide at a group home for the handicapped, Range Center, in June 1997. The employee testified that he was able to accommodate his shoulder condition in these jobs, although he did have some difficulty with repetitive vacuuming in the janitorial job with Pride of Minnesota. (T. 36-40; Exh. L at 21-30; Findings 22-27.)

On June 9, 1997, the employee began full-time employment as a driver and yardman with the United Building Center at $7.00 per hour. He continued in this job through the date of the hearing below, March 17, 1998. The job involves delivery driving, operating a forklift, assisting customers with the loading and unloading of building materials, and miscellaneous maintenance tasks including clearing out snow from doorways. The employee testified that he has been able to accommodate his shoulder condition, so as to avoid heavy lifting or repetitive use of or lifting by his right arm above shoulder level. (T. 30-35.)

At various times over the past several years the employee sought further medical treatment for his shoulder condition. He was seen at the Duluth Clinic on July 21, 1994 by Dr. Mark D. Wagner, M.D. His shoulder was tender to palpation over the entire right rotator cuff. Arthralgia was diagnosed, and the employee was given a cortisone injection to the shoulder. On December 18, 1996, he returned to Dr. Wagner reporting persistent problems with the right shoulder, which was giving him pain when doing activities at work and at home. The employee underwent physical therapy, and was given another cortisone injection on February 7, 1997. On March 26, 1997, Dr. Wagner diagnosed rotator cuff tendinitis. The employee continued to treat with Dr. Wagner periodically for his right shoulder through the date of hearing below, and received further corticosteroid injections on August 12, 1997, on October 2, 1997, after which Dr. Wagner released him to return to work without restriction on October 27, 1997, and on January 8, 1998, at which time Dr. Wagner's notes reflect that the employee was advised to limit the use of his shoulder to activities which are nonpainful. The employee testified that Dr. Wagner had previously similarly advised him to limit the use of his shoulder throughout his medical treatment. (T. 33; Exh. 8 at 301-306, 320, 356, 359, 472-473.)

A disability examination for the Minnesota Department of Economic Services was performed by Dr. D. F. Person, an orthopedic surgeon, on May 27, 1997. Dr. Person found limitation in external rotation, which was painful. There was anterior tenderness in the shoulder.

Dr. Person opined that the employee had an old dislocation of the right shoulder and since had developed chronic tendinitis in the shoulder. He concluded that the employee was able to perform work, but might "need some limits as to what he does with his right shoulder." (Exh. 8 at 358-359.)

Dr. F. W. Budd, an orthopedic physician, examined the employee on behalf of the employer and insurer on March 2, 1998. Dr. Budd opined that the employee had subluxed his shoulder as a result of the March 9, 1992 work injury, but that his injury had healed with adequate treatment and that the employee had gained a good functional range of motion with minimal discomfort. He agreed that maximum medical improvement had been reached in July 1992 consistent with the prior MMI opinion of Dr. Davenport. Dr. Budd had "no problem" with Dr. Wagner's ongoing treatment of the employee's symptoms, which he considered to be adequate; however, he did not believe that the employee's ongoing symptoms were still a product of the 1992 injury. (Exh. 9.)

The employee filed a rehabilitation request on June 4, 1997 seeking a rehabilitation consultation. On August 19, 1997, the Department of Labor and Industry served and filed an administrative Decision and Order denying the rehabilitation consultation, and on September 16, 1997, the employee filed a request for a formal hearing. On November 21, 1997, the employee filed a claim petition seeking temporary partial disability compensation for various periods after April 30, 1995 and reimbursement of certain medical expenses. The employer and insurer answered denying liability, and on November 25, 1997 the rehabilitation issue was consolidated for hearing with those raised by the claim petition. A hearing was held before a compensation judge of the Office of Administrative Hearings on March 17, 1998. By agreement of the parties, the judge also considered the contention of the employer and insurer that the permanent partial disability previously paid had been paid in error. Following the hearing, the judge found, among other things not here at issue, that the employee had sustained a three percent permanent partial disability and that the prior payment was not made in error; that, as a result of the injury, the employee has had to avoid certain physical activities with the right shoulder and arm, constituting physical limitations; that as a result of his disability, the employee had sustained wage losses for certain periods and was entitled to temporary partial disability compensation; and that the employee is entitled to a rehabilitation consultation. The employer and insurer appeal.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings 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, 59, 37 W.C.D. 235, 239 (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

Permanent Partial Disability

Minn. R. 5223.0110, subp. 3B, provides a three percent permanent partial disability rating for an anterior or posterior shoulder dislocation, no surgery, single episode. The employer and insurer paid permanent partial disability with reference to this schedule, apparently based on the medical diagnoses of a subluxed, or dislocated, right shoulder. At the hearing below, the employer and insurer argued that permanency had been paid in error, and that the employee had sustained no permanent partial disability in light of the zero percent rating given by Dr. Davenport in his October 6, 1992 maximum medical improvement report. They argue that no objective medical evidence exists to support the three percent rating, and contend that the compensation judge erred in finding that the employee had sustained a three percent permanency and in his consequent holding that the permanency previously paid had not been paid in error.

We affirm. All of the physicians who have examined or treated the employee, including the employer and insurer's examiner, Dr. Budd, have agreed that the employee sustained a dislocation of the right shoulder as a result of the March 9, 1992 work injury. The dislocated state of the shoulder was directly observed by Dr. Jan Dawson that same day. Dr. Dawson's report notes that the shoulder was seen to "sublux," or partially dislocate, anteriorly with force or torque; but that it was easily snapped back into place. The direct observation by a trained physician of this medical condition certainly constitutes objective evidence to support the disability.

In light of the undisputed diagnosis of a right shoulder dislocation, the compensation judge correctly rated the employee with a three percent permanent partial disability pursuant to Minn. R. 5223.0110, subp. 3B. Although Dr. Davenport's October 6, 1992 maximum medical improvement report, the only medical report rating disability in this case, rated the employee with a zero percent permanency, the compensation judge properly disregarded this rating in light of the undisputed evidence that the employee's condition met the prerequisites of the three percent rating given in the permanency schedules. While permanency ratings offered by physicians may assist the compensation judge in determining permanency, these opinions are not binding. Erickson v. Gopher Masonry, Inc., 329 N.W.2d 40, 35 W.C.D. 523 (Minn. 1983). Rather, a compensation judge's finding of a permanent partial disability rating is one of ultimate fact and must be affirmed if it is supported by substantial evidence. Jacobowitch v. Bell & Howell, 404 N.W.2d 270, 274, 39 W.C.D. 771, 778 (Minn. 1987).

Temporary Partial Disability

An injured employee demonstrates entitlement for temporary partial disability benefits by showing that he has sustained an actual loss of earning capacity that is causally related to a disability resulting from the injury. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 46-47, 245 N.W.2d 451, 454, 29 W.C.D. 86, 91 (1976). However, "where the employee is found medically able to return to work without restrictions, having suffered no residual disability from his work injury," there is no basis for payment of temporary wage loss benefits or rehabilitation services after that date. Kautz v. Setterlin Co., 410 N.W.2d 843, 845, 40 W.C.D. 206, 208 (Minn. 1987). 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 disabled condition. Minn. Stat. § 176.101, subd. 2 (1992). Where a disabled employee has found post-injury employment at a wage loss, the post-injury wages are deemed presumptively representative of the employee's reduced earning capacity unless the presumption is rebutted with evidence indicating that the employee's ability to earn is different than the post-injury wage period. Einberger v. 3M, 41 W.C.D. 727 (W.C.C.A. 1989).

The employer and insurer appeal from the compensation judge's award of temporary partial disability principally on the contention that the employee failed to provide adequate support for the proposition that the employee has any restrictions on his ability to work. Specifically, they point out that no specific medical restrictions were ever imposed by any physician, and that the primary evidence to support the employee's claim that his loss of earnings was causally related to his disability was his own testimony that he needed to observe certain practical limitations on the use of his right shoulder and that these limitations had adversely affected his search for employment returning him to a wage approaching or exceeding that which he received on the date of injury. The employer and insurer argue that in order for an employee to be eligible for temporary partial disability an employee must show that a physician has imposed specific restrictions on the employee's ability to work. They assert that where no specific restrictions are contained in the medical records, an employee's testimony is insufficient to meet the employee's burden of proof of a disability or restrictions.

The compensation judge found that while the employee had never been given any formal restrictions, his physicians had "advised [him] to in effect use his head, use common sense in the use of his right arm and shoulder" and that the employee had reasonably concluded "by actual experience, that use of his right arm above shoulder level causes a marked increase in symptomology [and] that any employment involving such activity is inappropriate." (Mem. at 10; Finding 19.) The compensation judge also found that "[a]s a result, since the date of injury the employee has been precluded from returning to work which he had done in the past." Noting that the employer and insurer had produced no evidence rebutting the presumption of a reduction in earning capacity from diminished post-injury earnings, the judge found that the employee had during subsequent employments sustained "a wage loss reflecting a decrease in earning capacity specifically attributable to the right shoulder injury of March 9, 1992." (Findings 21, 24-29; Mem. at 9.)

The compensation judge rejected the employer and insurer's argument that restrictions could not be determined based primarily on an employee's testimony, noting the long-

standing doctrine that an employee's testimony alone may serve as a sufficient basis for determination of the physical demands of a job and their relationship to specific symptoms. Cf., e.g., Brening v. Roto-Press, Inc., 237 N.W.2d 383, 28 W.C.D. 225 (Minn. 1975). The employer and insurer argue that this doctrine is no longer good law and renew their argument that medical restrictions or vocational disability cannot be determined primarily through an employee's testimony. We recently considered this issue and rejected the employer and insurer's position in Nelson v. Northern Milk Prods., slip op. (W.C.C.A. Dec. 11, 1998). There, under markedly similar facts, we found an employee's testimony concerning his physical limitations to constitute substantial evidence supporting a compensation judge's finding that the employee had a disability which affected his ability to work and which limited his earning capacity. We see no reason to conclude that the similar evidence in this case would be legally insufficient to sustain the judge's findings.

One further contention by the employer and insurer bears brief mention. The compensation judge's reliance on the employee's testimony was, of course, highly dependent upon his finding that the employee was a credible witness on the issue of his disability and restrictions and on the way in which he observed these restrictions in performing his post-injury employment. The employer and insurer sought to impeach the employee's testimony on his need to observe restrictions by way of a surveillance video which, they contend, demonstrates that the employee did not actually observe the claimed restrictions while engaged in his most recent post-injury job. The compensation judge found that the video did not show the employee engaged in activities which in any significant way contradicted the employee's testimony or demonstrated any effective ability to perform work outside of the employee's self-stated restrictions. On reviewing the videotape, we agree with the compensation judge. Although the employee arguably may be seen to have briefly raised his right arm above his shoulder level on a very few occasions, it does not appear that this was in the course of performing repetitive or significantly weight-bearing activity. Since this tape represented the distillation of extensive surveillance, we do not see any clear contradiction to the employee's testimony. In addition, we note, as did the compensation judge, that the employee found it necessary to return to his physician for a cortisone injection on the very day following the few questioned activities complained of by the employer and insurer.

As we conclude that the compensation judge's decision to award temporary partial disability based on actual earnings is supported by the presumption and by substantial evidence in the record, it is affirmed.

Rehabilitation Consultation

Generally, an employee is entitled to a rehabilitation consultation on request. Minn. Stat. § 176.102, subd. 4. Here, the employer and insurer's denial of the employee's right to a rehabilitation consultation was apparently predicated on their contention that the employee was medically able to return to work without restrictions or residual disability from his work injury, such that he would have no entitlement for rehabilitation services pursuant to Kautz v. Setterlin Co., 410 N.W.2d 843, 845, 40 W.C.D. 206, 208 (Minn. 1987). We have affirmed the compensation judge's determinations both that the employee had sustained a three percent residual

permanent partial disability and that he was subject to certain restrictions which limited his reemployment prospects and adversely affected his earning capacity. These determinations are therefore determinative of the issue of the employee's right to a rehabilitation consultation. The compensation judge's order awarding the consultation is affirmed.