

ROBERT MAXFIELD, Employee/Appellant, v. STREMEL MFG. CO. and SENTRY INS. CO.,
Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 6, 1999

No. [REDACTED SSN]

HEADNOTES

PENALTIES - SUBSTANTIAL EVIDENCE; STATUTES CONSTRUED - MINN. STAT. § 176.225, SUBD. 1. Where, in its earlier decision reversing the compensation judge's denial of disability benefits, the Workers' Compensation Court of Appeals had listed several items of evidence supporting the employer and insurer's opposition to payment of benefits, and where the employee's entitlement to penalties for a period of disability benefits conceded by the employer and insurer at the time of trial was not clearly at issue for litigation at the hearing, sufficient evidence existed to support the compensation judge's denial of penalties against the employer and insurer on remand, notwithstanding the supreme court's summary affirmance of the WCCA's conclusion that the judge's denial of disability benefits was unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wheeler, C. J., and Hefte, J.
Compensation Judge: Bonnie A. Peterson

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's denial of penalties pursuant to Minn. Stat. §176.225. We affirm.

BACKGROUND

On November 13, 1991, Robert Maxfield [the employee] sustained a work-related injury to his low back while employed as an ironworker with Stremel Manufacturing Company [the employer]. The injury proved permanent, and the parties have stipulated to the fact that the employee sustained a 10.5% whole body impairment as a consequence. Eventually the employee was granted retraining as a paralegal, which he completed with an excellent grade point average in December 1995. Notwithstanding a subsequent Job Placement Plan and Agreement [JPPA] that targeted paralegal jobs paying \$8.00 an hour, in early April 1996 the employee returned to a \$6.00-an-hour job as a laborer with A-1 Outdoor Power, a small business owned by a relative, which he had held prior to his retraining as a paralegal. About the same time, on April 5, 1996, the employee filed a Claim Petition, seeking benefits including economic recovery compensation

[ERC] for his permanency, penalties pursuant to Minn. Stat. §§ 176.221 and 176.225, and, by later amendment, temporary partial disability benefits commencing April 1, 1996. Subsequently, in late November 1996, the employee took a job with Quorem Legal Services [Quorem], not as a paralegal but as a “document coder,” at which he earned initially \$7.00 an hour and eventually \$8.00 an hour.

The matter came on for hearing on April 8, 1997. At the time of the hearing, the employer and insurer agreed to pay the employee temporary partial disability benefits retroactive to the beginning of his employment with Quorem in November 1996. The employee’s claim for temporary partial disability benefits was thereby limited to a period from April through November 1996. Subsequent to that concession in temporary partial disability benefits by the employer and insurer, immediately prior to opening arguments, and as the only identification of the penalties issue on the record, the employee’s attorney stated, “The only - - The only addition that we would make is we did assert a claim for penalties and interest associated with temporary partial - - and he received benefits.” In the course of the ensuing hearing, nearly all of the testimony pertained to periods of disability prior to the employee’s November 1996 employment with Quorem, except for some very brief direct examination of the employee and of his QRC.¹ During these brief parts of testimony, the employee was questioned as to the nature of his work for Quorem, his wages for that work, and his job search since commencing that employment, and his QRC was questioned as to the suitability of the Quorem job. This testimony contained no evidence as to the employee’s attempts to obtain disability benefits from the employer and insurer. By Findings and Order filed June 2, 1997, the compensation judge concluded that the employee’s cooperation with rehabilitation and search for work had not been sufficiently diligent to entitle him to the disability benefits at issue, and she denied those benefits together with the employee’s request for penalties on ERC benefits “and [on] temporary partial disability benefits through November 1996.” The judge made no findings or order as to the employee’s entitlement to penalties for the employer and insurer’s delay in paying the post-November 1996 temporary partial disability benefits that were conceded at hearing.

The matter was subsequently appealed to this court. In his brief on appeal, the employee argued that he was entitled to penalties “on all temporary partial disability benefits owing,” including those subsequent to November 1996 and up to the date of hearing that were conceded by the employer and insurer on the date of hearing. Penalties on these latter benefits were due, he argued, in that “[t]he employer and insurer have offered no defenses as to their failure to timely pay such benefits.” In response, the employer and insurer argued first that the statute authorizes as a penalty only a percentage “of the total compensation award,” Minn. Stat. § 176.225, subd. 1 (emphasis added), and that in this case “the compensation judge did not award any compensation to the Employee.” Second, they argued “more importantly” that the employer and insurer had not violated any of the provisions of the statute and that “TPD benefits were denied pending receipt of information from the Employee regarding his employment with Quor[e]m Legal

¹ Examination of the employee as to the period of his Quorem employment spans about 4 pages of a 141-page transcript; that of his QRC spans about 2 pages.

Services.” By a decision filed December 2, 1997, this court reversed the compensation judge’s denials of disability benefits, on grounds that substantial evidence did not support the judge’s decision that the employee’s job search and cooperation with rehabilitation efforts were inadequate. In that same decision, we remanded the issue of penalties for reconsideration, concluding that the judge had “probably denied the employee’s penalty claim based on her denial of the employee’s underlying claims for ERC and temporary partial disability benefits” and that that “probable rationale does not at any rate explain her denial of penalties for the employer and insurer’s late payment of temporary partial disability benefits based on the employee’s earnings from Quorem Legal Services.” Our decision was in turn appealed to the supreme court, which summarily affirmed by a decision filed February 27, 1998.²

On June 3, 1998, the compensation judge filed her decision on remand of the penalties issue. In that decision, reiterating that she had earlier found sufficient grounds for denying the employee’s claim for temporary partial disability benefits and ERC, the judge found that “[t]he employer and insurer had sufficient grounds for not voluntarily paying benefits claimed by the employee” and that “[n]o evidence was submitted that the employer and insurer delayed payment of benefits for any . . . reason other than they had reason to believe that the benefits were not due and owing the employee.” On those findings the judge denied again the employee’s request for penalties. The judge’s decision did not specifically address the employer and insurer’s delay in paying the post-November 1996 temporary partial disability benefits conceded at the time of hearing. The employee appeals.

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.

² Other facts contained in the Background section of our December 2, 1997, decision are hereby incorporated by reference.

DECISION

In her memorandum on remand, having reiterated her findings as the bases for her decision, the compensation judge states, “Although the Court of Appeals indicates that the Compensation Judge was ‘clearly’ erroneous in her decision, the undersigned does not feel that way.” She explains further, “The statute provides specific requirements for determination of penalties. This was not met in this case.” The judge does not identify the “specific requirements” or even the specific statute to which she refers. Nor, as we indicated earlier, does the judge specifically address the employer and insurer’s delay in paying those post-November 1996 temporary partial disability benefits for which the employer and insurer conceded liability on the date of hearing. The employee contends that the compensation judge’s denial of penalties is unsupported by substantial evidence, asserting that “the compensation judge does not articulate a good faith basis upon which the Employer and Insurer denied payment” and that “the Employer and Insurer have provided at trial absolutely no evidence that the employee failed to cooperate with rehabilitation.” We are unpersuaded, both with regard to penalties on those ERC and temporary partial disability benefits that were actually at issue at the hearing and with regard to penalties on those post-November 1996 temporary partial disability benefits that were conceded by the employer and insurer at the hearing, although the latter penalties may be a closer question.

Our December 2, 1997, remand in this matter was based on the fact that we could conclude from the compensation judge’s original decision only that the judge had “probably denied the employee’s penalty claim based on her denial of the employee’s underlying claims for ERC and temporary partial disability benefits” and the fact that that “probable rationale does not at any rate explain [the judge’s] denial of penalties for the employer and insurer’s late payment of temporary partial disability benefits based on the employee’s earnings from Quorem Legal Services.” In her brief decision now on remand, the judge still has not specifically addressed the period of the employee’s work at Quorem. Nor has she specifically supported her assertion in her memorandum that statutory requirements for penalties have not been met. It is, however, now clear at least that the judge’s denial of penalties is no longer simply attributable to her denial of the employee’s claims to disability benefits. Moreover, it is also clear that the judge, even after having read our decision, reiterated her position that the employer’s denial of benefits was based on bona fide defenses. These issues, as we indicated by the act of our remand, are to a large extent factual and so are importantly the province of the compensation judge.

With regard to the judge’s denial of penalties on those disability benefits that were actually litigated at the hearing, we note that our December 1997 decision cited evidence of the following in the record: “[h]ere, there is testimony suggesting that QRC Richardson had some concerns about the employee’s motivation to find work”; “it is true that the employee did not contact any temporary employment agencies prior to March 10, 1996; “the employee apparently rejected further placement assistance on March 27, 199[6]”;³ “[i]t is true that the employee

³ This date in our decision is actually March 27, 1997, rather than 1996. A footnote to the statement containing this date, however, indicates clearly that that difference was a typographical

returned to the same laborer job that he had been working at prior to retraining”; “QRC Richardson indicated that the employee ‘could have done better’” than that job; and “the A-1 Outdoor Power job . . . paid only \$6.00 an hour, . . . ‘certainly nothing near the \$722.00 a week he was making prior to his injury.’” Such evidence, while not sufficient to support the judge’s decision denying the disability benefits at issue, is sufficient to render the issue of the employee’s entitlement to those benefits genuine and so to defeat the employee’s allegation of a frivolous denial of a claim or of a frivolous, unreasonable, or vexatious delay in payment of benefits pursuant to Minn. Stat. § 176.225, subd. 1.⁴ See Minter v. Ford Motor Co., slip op. (W.C.C.A. June 6, 1991) (where there are colorable factual or legal arguments related to the issues, a penalty under Minn. Stat. § 176.225, subd. 1, is not appropriate); see also Jackson v. Eveleth Mining Co., 49 W.C.D. 591, 598 (W.C.C.A. 1993) (“in the normal situation, we might not consider penalties appropriate where there is at least a minimal colorable defense to primary liability”).

With regard to the employee’s request for penalties based on the period of his work with Quorem, subsequent to November 1996, several factors persuade us to affirm, notwithstanding the lack of detail in the judge’s decision on remand. We note first that the continuation of the employee’s claim for penalties on that period of benefits was not at all clear at hearing. Although the employee’s only assertion of his penalties claim at hearing occurred immediately following the employer and insurer’s concession of the post-November 1996 benefits, the employee neither specifically reasserted his claim to penalties on those particular benefits nor clarified the fact that his claim to those penalties was still being denied notwithstanding the employer and insurer’s concession and so remained an issue for litigation. We note further that, although the period of his employment at Quorem was very briefly addressed by the employee under direct examination, there is virtually nothing in either the statements and questioning by the judge or the cross-examination by the employer and insurer that would indicate that either the judge or the employer and insurer understood penalties on that period of benefits to be at issue. An employee’s burden to prove his claim naturally carries with it a burden also to assert that claim, and to do so clearly. Moreover, as the employer and insurer argued in their brief on their original appeal, the statute at issue appears to provide for a penalty of up to thirty percent of the employee’s total compensation “award,” and the judge here awarded no compensation. Given all of these

error.

⁴ Although he alleges in his claim petition entitlement to penalties pursuant to both Minn. Stat. § 176.221 and Minn. Stat. § 176.225, in his brief on appeal the employee appears to confine his penalties claim to Minn. Stat. § 176.225, subd. 1, and that statute’s protections in subdivision 1(e) against frivolous denial of a claim and in subdivisions 1(a) and 1(b) against, respectively, frivolous delay and unreasonable or vexatious delay in payment of benefits. We infer that the judge’s reference to “specific requirements” in the statute is probably to subdivision 1’s concluding statement, that “[f]or the purpose of this section, ‘frivolously’ means without a good faith investigation of the facts or on a basis that is clearly contrary to fact or law.” The employee quotes this provision without alleging inadequate investigation, proceeding then to argue on an essentially factual rather than legal basis.

circumstances, it was not unreasonable for the compensation judge in her original Findings and Order to abstain from making any findings on the employee's entitlement to penalties for that period of benefits that was no longer at issue at hearing. See Carroll v. Honeywell, Inc., slip op. (W.C.C.A. Mar. 31, 1992) (a compensation judge should make a determination of each contested issue of fact or law pursuant to Minn. R. 1415.3000, subp. 2.E., but the judge does not have authority to resolve matters not at issue); see also Deryke v. Pet Food Warehouse, slip op. (W.C.C.A. Sep. 18, 1997). A more express finding by the compensation judge on remand, either that penalties on the post-November 1996 benefits were not at issue below or that the employee had failed to prove entitlement to specifically those penalties, would have been helpful to us in our review of the judge's original denial of the penalties requested. However, the absence of such a finding is not by itself a sufficient basis for further remand, now that the judge has eliminated at least the mere denial of disability benefits as the principal rationale for her denial. This is particularly true in light of the fact that the Quorem job was of neither the professional category nor the wage level of work that had been targeted by the employee's JPPA, and in light of the employer and insurer's argument in their responsive brief on appeal from the judge's original decision, unrebutted by the employee, that "TPD benefits were denied pending receipt of information from the Employee regarding his employment with Quorem."⁵

Although we found the compensation judge's denial of disability benefits between April and November 1996 to be unsupported by substantial evidence, we conclude that sufficient evidence of record does exist to support the judge's conclusion that a genuine issue existed as to the employee's entitlement to those benefits. Moreover, we conclude that the employee's entitlement to penalties for delay in payment of those post-November 1996 disability benefits that were conceded at hearing was neither clearly identified by the employee as an issue for litigation at the hearing nor clearly proven by the employee pursuant to his burden. In light of these conclusions, and noting again that an award of penalties pursuant to Minn. Stat. § 176.225 normally rests within the sound discretion of the compensation judge, see Thompson v. Nelson Constr. Co., 50 W.C.D. 222, 230 (W.C.C.A. 1993), we affirm the compensation judge's denial of penalties in this case. Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

⁵ The employer and insurer do not address the period of employment with Quorum in their current brief on appeal from the judge's decision on remand.