KEVIN SHAPIRO, Employee, v. MINNESOTA MINING & MFG., SELF-INSURED, adm'd by HELMSMAN MGMT. SERVS., INC., Employer-Insurer/Appellants, and CHOICE PLUS, Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 30, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY; WAGES - CALCULATION. The compensation judge properly used the week-by-week method to determine the employee's post-injury earnings, where the employee's post-injury earnings were readily ascertainable and the employee was paid on a weekly basis. Substantial evidence supports the compensation judge's award of temporary partial disability benefits based on the difference between the employee's week-by-week post-injury earnings and his pre-injury average weekly wage.

Affirmed.

Determined by: Johnson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Carol A. Eckersen

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's determination of the employee's post injury earnings and her award of temporary partial disability benefits. We affirm.

BACKGROUND

Kevin Shapiro, the employee, sustained a personal injury to his left shoulder on March 12, 1998, while working as a maintenance electrician for Minnesota Mining & Manufacturing, the employer, then self-insured with claims managed by Helmsman Management Services, Inc. The self-insured employer admitted the employee sustained a temporary aggravation of a pre-existing condition on March 12, 1998, and paid certain medical expenses.

Following the March 12 injury, the employee's supervisor drove the employee to the Regina Hospital emergency room. An x-ray showed an anterior subcoracoid dislocation of the humeral head of the employee's left shoulder. A second x-ray performed six minutes later showed a partial reduction of the dislocation. Dr. McNiff prescribed a shoulder immobilizer and instructed the employee to follow-up with his family physician. (Resp. Ex. 4.) The employee

saw Dr. Monty Seper at the River Valley Clinic on March 16, 1998. The doctor diagnosed a left shoulder dislocation and stated the employee needed to keep his arm in a sling for at least four weeks. Dr. Seper allowed the employee to work but without the use of his left arm. On April 13, 1998, Dr. Seper prescribed physical therapy. (Resp. Ex. 3.)

Dr. Seper then referred the employee to Dr. Peter Daly, an orthopedic surgeon. Following an examination on May 22, 1998, Dr. Daly diagnosed a left shoulder dislocation with probable history of pre-existing capsular laxity. The doctor recommended surgery in the nature of a Bankart capsular labral reconstruction. (Resp. Ex. 8.) Dr. Daly opined the March 12, 1998 injury was a permanent aggravation of a pre-existing shoulder capsular laxity. (Pet. Ex. C.) As of the date of hearing, that surgery had not been accomplished. The employee testified he wants to proceed with the surgery recommended by Dr. Daly. (T. 43.)

On August 26, 1998, the employee returned to see Dr. Seper. The doctor allowed the employee to return to work with no heavy lifting or overhead lifting using the left arm. (Resp. Ex. 3.) The employee testified he was unable to lift his left arm completely overhead and has not tried to lift any substantial weight with his left arm since his injury. The employee has continued to work for the employer since the injury, but has complied with the restrictions established by Dr. Seper. (T. 41-42.)

Dr. Paul T. Wicklund examined the employee on April 3, 1999, at the request of the self-insured employer. He diagnosed an anterior/inferior instability of the left shoulder which the doctor concluded pre-existed the March 12, 1998 incident. Dr. Wicklund opined the March 1998 injury was a temporary aggravation of this pre-existing condition that lasted from four to six weeks. Dr. Wicklund restricted the employee from working overhead with his left shoulder on a constant basis or lifting more than ten pounds overhead. However, the doctor opined these restrictions should have been in place before March 12, 1998. (Resp. Ex. 2.)

The employee was hired as a maintenance electrician by the employer in January 1995. His duties included general electrical maintenance and troubleshooting. The job required lifting up to 50 or 60 pounds using one or both hands and working with the arms in an overhead position. Prior to his injury, the employee had been able to perform all the tasks assigned to him by the employer. (T. 33-35.) The employee has continued to work for the employer since his injury and the employer has accommodated his restrictions. The employee testified "there hasn't been a real problem with it." (T. 46.) If a particular assignment required the employee to perform tasks beyond his restrictions, the employee asked his supervisor or co-employees for help. (T. 47.) The employee has worked his regular 40 hour shift and has worked overtime since his injury. (Pet. Ex. A; Resp. Ex. 9.)

The employer and the union had an overtime agreement governing how maintenance electricians obtained overtime work. Overtime hours were available to electricians with priority given to those employees with the fewest number of overtime hours during any particular week. Overtime hours were available on the weekends. An employee could sign up on Thursday morning to work overtime during the upcoming weekend. (T. 45.) Under the

overtime agreement, the employer paid time and a half on Saturday and double time on Sunday. Prior to his injury, the employee typically bid on one or two weekends of overtime a month. (T. 88-89.) Thus, the employee made more money in some weeks than in others because of his overtime hours. During the 26 week period prior to the injury, the employee worked overtime during 12 weeks. (Resp. Ex. 9.) The parties stipulated that on the date of injury the employee earned a weekly wage of $1,119.46.

Prior to his injury, the employee testified he had no limitations on the overtime on which he bid. The employee testified "I would take anything at that point." (T. 46.) The employee has continued to bid for and work overtime since his injury. However, the employee testified "if I sign up for overtime, it can only be - - like it can only be like an afternoon shift or a midnight shift where I'm only going to be doing maintenance type of electrical, which is basically troubleshooting only." (T. 45.) The employee testified that he avoided overtime hours which involved construction work. (T. 91.) When asked why, the employee responded, "[w]ell, I don't want to put myself at risk." (T. 46.) During the 26 week period following his injury, the employee worked overtime during 14 weeks. (Pet. Ex. A; T. 90-91.)

The employee filed a claim petition seeking temporary partial disability benefits from March 12, 1998 and continuing, and payment for the shoulder surgery recommended by Dr. Daly. The case was heard by a compensation judge at the Office of Administrative Hearings on May 26, 1999. In a Findings and Order served and filed July 26, 1999, the compensation judge concluded the recommended shoulder surgery was reasonable and necessary and ordered the self-insured employer to pay for the surgical costs, subject to the fee schedule. The compensation judge further concluded the employee sustained a loss of earning capacity as a result of his injury of March 12, 1998 and ordered the self-insured employer to pay temporary partial disability benefits computed on a weekly basis. The self-insured employer appeals the award of temporary partial disability benefits.

STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

The compensation judge found, that after his personal injury, the employee only bid for overtime doing repair work on the afternoon or midnight shift to avoid reinjuring himself. The compensation judge further found the employee "is not able to sign up for as much overtime as he did before his injury." (Finding 11.) The appellant contends this finding is unsupported by substantial evidence and asserts the employee has not sustained a loss of earning capacity because his post-injury earnings have not decreased.

The self-insured employer argues that it is only when the employee's post-injury earnings are viewed on a week-to-week basis that the employee has sustained any wage loss. By using, instead, an average of the employee's post-injury earnings, the appellant contends such averaged weekly earnings exceed the employee's pre-injury weekly wage. Respondent's Exhibit 9 is an itemization of the employee's earnings during the 58 weeks following the injury commencing with the pay period ending March 15, 1998 through April 25, 1999.[1] The employee earned $67,596.39 over this 58-week period. When averaged, the employee's post-injury weekly wage was $1,165.46, which exceeds his pre-injury wage of $1,119.46. Accordingly, the appellant argues the employee sustained no real reduction in earnings and, therefore, has no entitlement to temporary partial disability benefits.

The appellant further contends the week-by-week method of computing temporary partial disability benefits is, in this case, improper and results in the employee's receipt of benefits in excess of his pre-injury earning capacity. The appellant contends the employee's post-injury earnings should be averaged over some selected period of time to accurately determine the employee's post-injury earning capacity. In failing to do so, the appellant argues the compensation judge erred. We are not persuaded.

To prove entitlement to temporary partial disability benefits, an employee must demonstrate a work-related physical disability and an actual loss of earning capacity that is causally related to the disability. Krotzer v. Browning-Ferris, 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976). A diminished earning capacity may be established by demonstrating actual decreased earnings, thus creating a presumption of a diminished earning capacity. See French v. Minnesota Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1983). There is no dispute the employee has a work-related physical disability which restricts the use of his left shoulder. The issue is whether the employee proved an actual loss of earnings caused by that disability.

The employee testified he limited the overtime on which he bid to the afternoon or midnight shifts when he would do maintenance-type electrical work that was basically troubleshooting only. (T. 45.) Some overtime jobs involved construction work which the employee did not bid on because he was concerned about reinjuring himself. (T. 91.) The compensation judge found this testimony credible. (Memo. at p. 8.) Petitioner's Exhibit A

[1] According to the exhibit, the time period contains 59 weeks, but the employee did not work the week of November 8, 1998 so there are 58 pay periods.

itemizes the employee's claim for temporary partial disability benefits from the week ending March 23, 1998 through May 9, 1999, a period of 59 weeks. During this 59-week period, the employee earned less than his pre-injury weekly wage during 40 of the 59 weeks. This evidence supports the compensation judge's conclusion that the employee sustained a loss of earnings as a result of his personal injury.

The parties stipulated to a pre-injury weekly wage of $1,119.46. This wage was based on an average of the employee's weekly earnings in the 26 weeks prior to his injury. See Minn. Stat. § 176.001, subd. 3, 18.[2] There is no similar statute governing the calculation of post-injury earnings. This court has accepted two methods of analyzing post-injury earnings for the purpose of calculating temporary partial disability benefits: the week-by-week method and the averaging method. See, e.g., Peterson v. Control Data Corp., 53 W.C.D. 302 (W.C.C.A. 1995) and Nutter v. United Parcel Serv., 58 W.C.D. 183 (W.C.C.A. 1997). Under the week-by-week method, temporary partial disability benefits are awarded if the employee's post-injury earnings for any particular week or pay period are less than the weekly wage on the date of injury. Under the averaging method, temporary partial disability benefits are awarded if the employee's earnings over some selected period are less than the date of injury wage.

In Erdrich v. Ford Motor Co., 49 W.C.D. 528 (W.C.C.A. 1997) this court stated the week-by-week method is consistent with Minn. Stat. § 176.101, subd. 2(a) and is, therefore, favored and should be applied in most cases. "[I]n cases where the employee is an hourly worker, paid on a weekly or bi-weekly basis, we believe that the week-by-week method is generally more appropriate." Id., at 533-34. We further noted in Erdrich that the primary problem with the averaging method is that there is no established or standard period of time over which to average the post-injury wages. The length of the averaging period used can, in certain cases, have a significant impact on the amount of temporary partial disability benefits. In this case, using the appellant's computation, the employee would have no entitlement to temporary partial disability benefits if the averaging period included the entire 58 weeks of the claim. (See Resp. Ex. 9.)[3] However, averaging the employee's earnings over the 26 weeks following the injury[4] results in a temporary partial disability claim for those 26 weeks of $923.00.[5] (See Ill. B attached to

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[2] The parties apparently did not calculate a daily wage as the statute provides. Rather, it appears the parties simply averaged the employee's earnings during the 26 week period prior to his injury.

[3] Respondent's Exhibit 9 indicates the employee earned $67,596.13 over the 58 weeks following his injury which yields an average weekly wage of $1,165.46.

[4] From the pay period ending 3/22/98 through the pay period ending 9/13/98, a 26-week period, the employee earned $28,183.07 or $1,083.96 a week, which is $35.50 a week less than his pre-injury wage.

[5] Utilizing the week-by-week method, the employee's temporary partial disability claim

appellant's brief). Presumably, averaging the employee's post-injury earnings over some different period would yield a different result.

The issue of a compensation judge's use of an averaging method has been before this court many times. In Byrne v. Hanover Shoes, 39 W.C.D. 580 (W.C.C.A. 1987), the employee's post-injury earnings were irregular and varied due to the nature of the employment and the mode of payment for such employment. In affirming the compensation judge's use of the averaging method, the court stated "although we do not find that the law relating to temporary partial disability benefits demands an averaging of the employee's earnings in a manner such as was suggested by the compensation judge, neither do we find such an approach unreasonable nor contrary to statute." Id., at 582. In Barry v. Donaldson Constr. Co., 47 W.C.D. 178 (W.C.C.A. 1992), the employee's post-injury wages were affected by weather and periodic lay-offs such that the employee was not able to work every day or able to always work eight hours a day. The number of hours worked each week varied from less than eight to more than 50. In Nutter, 58 W.C.D. at 183, the employee was a helicopter pilot who earned $2,400.00 a month during the six-month fire season, but earned only $1,200.00 per month during the off-season. In Salava v. American Hoist & Derrick Co., slip op. (W.C.C.A. April 23, 1991) the employee's post-injury hours of employment were neither regular nor always full-time. See also, Fidler v. Northstar Hockey Partnership, slip op. (W.C.C.A. April 7, 1987). In each of these cases, this court concluded the facts of the particular case supported the compensation judge's use of the averaging method to compute temporary partial disability benefits.

Similarly, the issue of whether a compensation judge properly used the week-by-week method has been before this court many times. See, e.g., Lemire v. Montgomery Ward, 47 W.C.D. 396 (W.C.C.A. 1992); Peterson v. Control Data Corp., 53 W.C.D. 302 (W.C.C.A. 1995); Murphy v. B.F. Nelson, slip op. (W.C.C.A. Oct. 8, 1998). In Becker v. Dependable Maytag, slip op. (W.C.C.A. July 28, 1994) this court stated:

> Where the employee's post-injury weekly wages are readily ascertainable, and the employee is being paid on a fairly regular basis, the week-by-week method is generally favored. The averaging method may be more appropriate where the employee's income remains irregular, and earnings paid in any given week vary quite substantially.

The determination of an employee's earning capacity is a question of ultimate fact for the compensation judge. Mathison v. Thermal Co., Inc., 243 N.W.2d 110, 28 W.C.D. 406 (Minn. 1976). The method to be used to calculate an employee's post-injury wage loss is also generally a question of fact for the compensation judge to determine on a case-by-case basis. Nutter, 58 W.C.D. at 188, citing Erdrich, 49 W.C.D. at 532-34. In this case, the employee's post-injury earnings are readily ascertainable and the employee is paid on a weekly basis. Although

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for the same 26-week period totals $2,297.73. (See Pet. Ex. A.)

his weekly earnings vary, the variance is not substantial and is due primarily to the amount of overtime worked. The employee generally worked at least 40 hours a week and his earnings apparently were not subject to seasonal conditions. In this case, we conclude the week-by-week method adopted by the compensation judge was reasonable. The award of temporary partial disability benefits is, accordingly, affirmed.