

MICHAEL J. THELEN, Employee/Cross-Appellant, v. THELEN HEATING & ROOFING, INC., and STATE FUND MUTUAL INS. CO., Employer-Insurer/Appellants, and THELEN HEATING & ROOFING, INC., and CNA INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 19, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - EARNING CAPACITY. In order for an employee to qualify for temporary partial disability benefits, there must be reasonably definite documentary and other evidence that his "employment" generated positive and substantial earnings, either actual or imputed. In a case where the employee's ongoing work was primarily in a self-employment venture, the compensation judge exceeded his authority in imputing an ongoing full-time weekly earning capacity from an already imputed hourly wage for only 5.3 hours of work a week that the employee had been performing without pay at a second job, particularly in that the judge himself had found that employee's self-employment activities had so far proved unprofitable and that the self-employment plan itself as it existed was unreasonably speculative and in need of amendment.

Reversed.

Determined by Pederson, J., Wilson, J. and Johnson, J.
Compensation Judge: Rolf G. Hagen

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's award of temporary partial disability benefits based on an imputed earning capacity and from the judge's consequent award of attorney fees. The employee cross-appeals from the judge's conclusion that the employee's earning capacity should be calculated based on a forty-hour work week rather than on actual hours worked. We reverse the judge's award of benefits and related attorney fees, rendering the cross-appeal moot.

BACKGROUND

On February 15, 1991, Michael Thelen [the employee] sustained a work-related injury to his low back while working as a tinsmith for Thelen Heating & Roofing, Inc. [the employer], at an average weekly wage of \$779.65. The employee was twenty-six years old at the time of his injury. He was able initially to return to work with the employer, but by the spring of

1992 he had become medically restricted by the injury from lifting over twenty-five pounds and from repetitive bending or twisting.¹ The insurer on the injury, State Fund Mutual Insurance Company [the insurer], commenced payment of wage replacement benefits apparently about that same time. On November 15, 1993, Dr. Peter Schmitz diagnosed the employee's injury as a ruptured disc at L4-5 and a bulging disc at L5-S1 and determined that the employee had reached maximum medical improvement [MMI] from that injury on September 27, 1993. The employer and insurer ultimately paid impairment compensation for a 14% whole-body impairment consequent to that injury. About two years after reaching MMI, in August of 1995, while still working for the employer, the employee apparently became temporarily disabled by an alleged aggravation of the injury, which aggravation is not here at issue.² Disability case management was evidently commenced in January of 1996, and by the end of April of that year the employee had been released to return to work at light duty, but the parties were apparently unable to agree upon a rehabilitation plan. On June 25, 1996, the employer and insurer filed a Notice of Intention to Discontinue [NOID] payment of temporary total disability benefits "due to [the employee's] self-employment."³

Apparently in July of 1996, the employee obtained the rehabilitation assistance of QRC Kenneth Moberg. On July 26, 1996, QRC Moberg proposed a Rehabilitation Plan contemplating that the employee would spend thirty to forty hours a week working at \$5.75 an hour as a supervisor and project estimator for Gull Lake Sandblasting [Gull Lake], a seasonal business belonging to his wife, and would spend his remaining working hours developing a business venture of his own entitled Fiber Tech Productions [Fiber Tech]. Fiber Tech's business is primarily the fabrication of fiberglass castings that are used in the replication of trophy fish.⁴ These castings are then either marketed wholesale to taxidermists or to other businesses to

¹ These restrictions were also the restrictions still recommended by the employer and insurer's independent examiner, Dr. Michael Davis, on August 25, 1997, over five years later, subsequent to eventual surgery.

² By March of 1994, the employer had become insured against workers' compensation liability by CNA Insurance Company [CNA], and a separate contribution and/or reimbursement claim of the employer and insurer herein against CNA for alleged March 1994 and August 1995 aggravations of the injury here at issue has been resolved and is not here material.

³ The rehabilitation plan developed by the employee's medical manager had targeted a return to work with a new employer in an area such as light production, resort work, sporting goods, or inspection. Although he had ultimately signed a June 12, 1996, Job Placement Plan and Agreement [JPPA] embracing these alternatives, the employee had evidently been adamant in resisting them, urging instead a plan embracing self employment, and the JPPA itself indicates that "Carmen ([the employee's] wife) will go to job search on his behalf."

⁴ Fiber Tech is apparently also equipped to do much larger than life-sized fiberglass facsimiles of animals, such as exist in public places in various towns around the state.

complete into fish replicas or are painted and completed into replicas by Fiber Tech itself for its own retail customers. The final replicas are analogous to a taxidermist's product, but the necessity of preserving the natural skin of the subject animal is avoided, either by casting the subject animal itself in fiberglass and then painting the casting or by painting a casting of an animal of identical size and species to exactly resemble the subject animal as it appears in a photograph. Because the initial molds for the castings are therefore reusable, Fiber Tech's cost in producing castings diminishes substantially as its inventory of molds grows. The employee's knowledge of the technology of this process is evidently due entirely to instruction that he has received from his father-in-law, Charles Riley, who the employee testified was principally responsible for inventing the technology while employed previously by what may be one of Fiber Tech's purportedly few competitors.

By the summer of 1996, Fiber Tech was not yet profitable, and on August 8, 1996, the insurer indicated that it would not agree to the proposed rehabilitation plan, essentially on grounds that it did "not consider \$5.75 to be suitable earning potential." The employee's work-related low back condition was deteriorating, and on October 3, 1996, based on a September 27, 1996, MRI scan, the employee underwent a hemilaminotomy and discectomy at L-3-4 on the left. He was subsequently released to return to light duty work on November 8, 1996, restricted by his surgeon to no more than twenty pounds lifting and no more than an eight-hour work day. His surgeon anticipated that the lifting restriction would be relaxed to thirty pounds after one month and to fifty pounds after two months.

On March 19, 1997, pursuant to a surveillance investigation of the employee, the insurer filed another Notice of Intention to Discontinue temporary total disability benefits, on grounds that the employee was actively engaged in the business of Gull Lake without reporting any earnings to the insurer and was not developing his Fiber Tech business as claimed. The matter was considered at an administrative conference at the Department of Labor and Industry on April 9, 1997. By order filed April 16, 1997, the settlement judge determined that there were reasonable grounds to discontinue the employee's temporary total benefits effective March 12, 1997, "as employee has been working and earnings are imputed to employee for the fair market value of those services." The judge ordered that, instead of temporary total disability benefits, the employee was entitled only to temporary partial benefits and that the employer and insurer were entitled to an offset pursuant to statute for any resulting overpayment. The settlement judge's order was that the substituted temporary partial benefits be calculated "at the temporary total disability rate" through the date of the conference, and on June 24, 1997, the employee requested another conference to enforce that order in response to an NOID evidently served by the insurer on June 19, 1997. The conference was held on July 22, 1997, and by order filed September 2, 1997, the settlement judge found reasonable grounds to discontinue temporary partial disability benefits effective June 19, 1997, "as employee has failed to show any earnings and has failed to show that the self-employment venture is pursuant to an agreed upon rehabilitation plan." The judge explained in his memorandum that temporary partial benefits had previously been ordered paid at the temporary total rate because, from the limited evidence available at the previous conference, the employee's potential undeclared earnings "did not appear sufficient to reduce the weekly indemnity payment below the maximum temporary total rate."

On September 18, 1997, the employee's QRC filed a Rehabilitation Request, seeking full implementation of a self-employment-based rehabilitation plan, amended to provide for yearly review. The amended plan was supported by substantially detailed cashflow assumptions, computer-assisted business projections,⁵ and comparative projections of alternative rehabilitation options, including two formal retraining options. On October 28, 1997, the employee filed an Objection to Discontinuance of temporary partial disability benefits after June 19, 1997, and requested consolidation of the matter with his pending Rehabilitation Request. The matters were subsequently consolidated for formal hearing at the Office of Administrative Hearings. On February 2, 1998, the insurer's claim specialist filed a Rehabilitation Request, seeking a rehabilitation conference in order "to reach an agreement that would be acceptable to all parties" regarding whether the employee should "enter self-employment, retraining or direct placement."

On March 27, 1998, vocational expert Rosemary Varriano-Anderson submitted to the employer and insurer's attorney the second of two assessments of the employee's rehabilitation prospects. In that report, Ms. Varriano-Anderson concluded the following: (1) that, based on restrictions issued by the employee's surgeon, the employee can return to his original occupation of sheet metal worker; (2) that, if job search activities are considered, the employee should be assisted by a party other than QRC Moberg's firm; (3) that, if retraining is deemed necessary, the parties should consider an Associates Degree, perhaps in an area such as estimating and bidding; (4) that the employee's self-employment venture in Fiber Tech may not be viable, based on information obtained from taxidermists and other sources, that taxidermy-related work is unstable as an occupation.

On April 1, 1998, the insurer's Rehabilitation Request was consolidated for hearing together with the previously consolidated Objection to Discontinuance and employee's Rehabilitation Request. Following a Functional Capacities Assessment of the employee on April 10, 1998, the matter came on for formal hearing on April 14, 1998. At hearing, the parties stipulated in part that the employee was a qualified employee for rehabilitation services and that attorney fees in accordance with Minn. Stat. § 176.081 were appropriate in the event of an award of disability benefits. Threshold issues at hearing were the employee's entitlement to temporary partial disability benefits continuing from June 19, 1997, and the nature of rehabilitation services to be provided. The employee testified at hearing in part that he had spent over twenty hours a week in the development and operation of Fiber Tech between June 19, 1997, and the date of hearing.

Also testifying at hearing were vocational expert Varriano-Anderson and QRC Moberg. Ms. Varriano-Anderson testified in part that in her opinion the employee had an earning

⁵ QRC Moberg suggested in eventual testimony at hearing that these projections were the product of analysis by personnel at a "small business development center" at a local community college.

capacity of between \$200 and \$280 a week in the Brainerd area, based on a presumption of full-time unskilled work. She testified also that “if a retraining program is sought for [the employee], that it - - that occupations are looked at that utilize[his] transferable skills.” She indicated that she “would go along the lines that use what he already has, and then add on to it” and that such retraining would result in a wage of about \$15.00 an hour, or about \$600.00 a week. In his testimony, QRC Moberg agreed with Ms. Varriano-Anderson’s opinion that the types of unskilled positions for which the employee was currently qualified would probably pay in the range of \$5.00 to \$7.00 an hour. As an alternative to a job search targeting such employment, QRC Moberg reiterated his recommendation of the self-employment rehabilitation plan that he had earlier proposed, suggesting that the Fiber Tech venture might even be essentially subsidized by the employer and insurer, as if it were an on-the-job retraining plan. QRC Moberg testified also that, subsequent to their rejection to the employee’s September 1997 Rehabilitation Request, the employer and insurer never did respond to the employee’s several inquiries as to whether they preferred direct placement, retraining, or self-employment to be the focus of the employee’s rehabilitation plan.

By unappealed findings, the compensation judge concluded the following: that for part of the benefits period at issue the employee had worked 5.3 hours a week for Gull Lake;⁶ that he was unpaid for that work but was imputing an hourly wage of \$7.00 an hour; that Fiber Tech had sustained losses in the first and second years of its operation and projected losses for up to four more years;⁷ that the employee had incurred a total of about \$66,000.00 in personal indebtedness, including a \$51,000.00 obligation to Mr. Riley and an agreement to share a percentage of any eventual profits with him; that neither the employee nor his QRC had investigated whether a trade association existed in the graphite/fiberglass reproduction business or the taxidermy business; that neither of them knew who the top competitors were or anything about their competitors’ market share or cash flow; that neither of them had been to the library or contacted the area Chamber of Commerce regarding the nature and/or potential success of the proposed self-employment venture, their primary source of information being Mr. Riley.

In keeping with these and related findings, the compensation judge, by Findings and Order filed June 17, 1998, expressly found that the rehabilitation plan proposed by QRC Moberg was “neither reasonable nor feasible, as drafted, and should be denied.” The judge adopted instead the opinions of Ms. Varriano-Anderson, including her conclusion “that a retraining/rehabilitation plan utilizing the transferable skills of the employee may be more appropriate and feasible.”⁸ Notwithstanding these conclusions, the compensation judge

⁶ Petitioner’s Exhibit I indicates that this period ran from April 14, 1997, through October 4, 1997.

⁷ Petitioner’s Exhibit E indicates that Fiber Tech sustained net losses of \$3,091.64 in 1996 and \$9,598.99 in 1997, respectively.

⁸ In Finding 10, the judge characterizes Ms. Varriano-Anderson’s reasons for finding the proposed plan speculative and not feasible as follows:

determined that the employer and insurer should pay the employee temporary partial disability benefits from June 17, 1997, through the date of hearing and “[f]rom and after [that date] and during the six month period following service and filing of these Findings and Order, or until further order of this Court (whichever comes later).” These benefits were to be paid while the parties “in good faith, further investigate/research the reasonableness and feasibility of the proposed self-employment business venture (Fiber Tech) and/or some alternative Rehabilitation Plan.” By this and a subsequent order the judge also awarded attorney fees on his awards to the employee. The employer and insurer appeal from the judge’s award of temporary partial disability benefits and attorney fees, and the employee cross-appeals from the judge’s calculation of earning capacity based on a forty-hour work week rather than on actual hours worked.

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

The compensation judge’s award of benefits in this case was based on an imputed earning capacity of \$280 a week. The earning capacity was imputed apparently from two

the startup costs are high; the time to projected profitability is long; the employee lacks knowledge and/or experience in both the operation and development/promotion of the business; that the proposed self-employment venture is really in the nature of a taxidermy business (albeit specialized) where there is a great deal of competition; that there has been inadequate research to determine the feasibility of the proposed self-employment venture; that the latest Functional Capacities Evaluation places the employee in the light/medium category and the taxidermy business is in fact in a medium category and may not be within the employee’s restrictions.

conclusions: first, that the employee was performing 5.3 hours of work each week for Gull Lake for which his wife would normally have paid someone other than her spouse \$7.00 an hour to do;⁹ second, that the employee was working essentially full time at this work in combination with his Fiber Tech venture. Analogizing the facts in this case with the facts in Hanmer v. Wes Barrette Masonry, 403 N.W.2d 839, 39 W.C.D. 758 (Minn. 1987), the employer and insurer contend in effect that the employee's 5.3 hours of unpaid activity a week as an estimator for Gull Lake and his profitless venture with Fiber Tech constitute an effective withdrawal from profitable "employment," such as would preclude any entitlement to temporary partial disability benefits. They argue that as a matter of law the judge erred in awarding temporary partial disability benefits and attorney fees based on an earning capacity imputed from these activities. We agree.

The employee has attempted to distinguish the facts in Hanmer from those in the present case by arguing that, once rehabilitation assistance is in place, as it was here, an employee's entitlement to wage replacement benefits is importantly dependent on his cooperation with rehabilitation services. See Bauer v. Winco/Energex, 42 W.C.D. 762, 769 (W.C.C.A. 1989), citing Mayer v. Erickson Decorators, 372 N.W.2d 729, 38 W.C.D. 107 (Minn. 1985). However, while perhaps relevant to rehabilitation issues such as the reasonable diligence of an employee's job search, the extent of an employee's cooperation with rehabilitation services is not relevant to the question before us, which is whether the employee is sufficiently "employed" to be entitled to temporary partial disability benefits.¹⁰

This court has frequently indicated that "employment" such as is required for eligibility for temporary partial disability benefits must generate positive earnings. See, e.g., Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991) (implicit in the requirement that an employee must be working to be eligible for temporary partial disability benefits is the additional requirement that the employee receive a wage or have earnings from that employment; where the self-employed employee performed "real" work but neither paid himself any wage nor had any earnings attributable to his work, denial of temporary partial disability benefits was proper). Although we have more readily imputed a date-of-injury weekly wage in order to have a basis for calculating benefits where an employee has clearly met his burden of proving a work-related injury, we have imputed a post-injury earning capacity more rarely, and then only in cases where there is definite and documented evidence of positive and substantial earnings by the employee. See, e.g., Brown v. Metropolitan Transit Comm'n, slip op. (W.C.C.A. Sept. 7, 1993) (where it was

⁹ As indicated earlier, both QRC Moberg and vocational expert Varriano-Anderson also agreed that \$7.00 an hour was the most that the employee might be paid for any other work in the Brainerd area for which the employee might be physically and otherwise eligible.

¹⁰ We note that, although the employer and insurer appealed nominally from the judge's fairly complex order as to amendment of the employee's rehabilitation plan, neither party appealed from the judge's order disapproving of the rehabilitation plan as proposed, and the employer and insurer did not address in their brief their appeal from the judge's order to amend that plan. Rehabilitation matters are therefore not at issue before this court.

supported by the employee's testimony and income tax records, the compensation judge's award of temporary partial disability benefits based on an imputed post-injury monthly wage of \$1,300 was not improper, although specific actual earnings could not be determined due to the cash nature of the business and although the employee drew less than \$1,300 a month during several of the months of the two-year benefits period at issue).¹¹ In the present case, the employee's own schedule of temporary partial disability claimed¹² alleges only very insubstantial earnings for only a few of the weeks of the benefits period at issue, and then only by imputing an hourly wage of \$7.00 for the few hours of work actually documented. Moreover, according to his own testimony and tax records, the employee actually lost money at his self-employment activities over that same benefits period.

We commend the compensation judge for his craft in attempting to carve out an equitable device by which to move the parties in this case toward settlement, which we believe might well be in both parties' best interests. However, we must conclude that the judge's device is not a proper one under the law. By essentially unappealed findings, the compensation judge concluded that the employee's work activities during the benefits period at issue, including his minimal work for Gull Lake and his self-employment activities with Fiber Tech, have together generated no substantial earnings and in fact have resulted in substantial losses. Given this conclusion, the judge erred in awarding temporary partial disability benefits based on an imputed positive earning capacity. As the supreme court suggested in Hanmer, an employee who is in good faith training himself for a suitable career of his own choosing need not sacrifice long-range ambitions and seize any short-range work open to him, but the employer and insurer are not obligated to subsidize that employee indefinitely without evidence that the career chosen by the employee is promising of suitable gainful employment. See Hanmer, 403 N.W.2d at 840, 39 W.C.D. at 760; see also Ratliff v. Hillenbrand Indus., slip op. (W.C.C.A. Feb. 2, 1993) (where employee had no net earnings for three years during his post-injury self-employment as a truck driver, the compensation judge reasonably denied temporary benefits on grounds that the employee had withdrawn from the competitive labor market). On this principle we reverse the compensation judge's award of benefits and related attorney fees.

Our reversal renders the employee's cross-appeal moot.

¹¹ See also Garrett v. Ford Motor Co., slip op. (W.C.C.A. May 12, 1992) (where the employee was actually earning \$4.25 an hour at his post-injury job but was not cooperating with rehabilitation efforts and there was evidence that he had passed up jobs paying between \$6.00 and \$7.00 an hour, the compensation judge reasonably imputed an earning capacity of \$6.50 an hour and awarded temporary partial disability benefits based on that higher earning capacity).

¹² See Petitioner's Exhibit I, as revised post-hearing, pursuant to order, by letter of the employee's attorney dated April 24, 1998.