ANTHONY THOMPSON, Employee/Cross-Appellant, v. VALVOLINE RAPID OIL CHANGE and CIGNA INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JUNE 23, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE. The record as a whole reasonably supported the compensation judge's alternative theories of compensability, and while the evidence might also have supported some other decision as to causation of the employee's accident, we find no compelling reason to reverse the judge's finding of primary liability.

TEMPORARY BENEFITS; PRACTICE & PROCEDURE - REMAND. Substantial evidence, including the employee's testimony and the medical records, minimally supported the compensation judge's decision that the employee was entitled to wage loss benefits for part of the claimed period, but a remand was required for reconsideration of the employee's entitlement during the remainder of the period, given the sparsity of evidence and the compensation judge's failure to explain her decision.

TERMINATION OF EMPLOYMENT - MISCONDUCT; PRACTICE & PROCEDURE - REMAND. A remand was necessary where the compensation judge failed to determine whether the employee had been discharged for misconduct within the meaning of Minn. Stat. § 176.101, subd. 1(e)(1).

MAXIMUM MEDICAL IMPROVEMENT - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion and the employee's medical records, supported the compensation judge's decision that the employee had in fact reached MMI prior to the date of hearing.

Affirmed in part, reversed in part, and remanded.

Determined by Wilson, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Janice M. Culnane

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision as to primary liability and the employee's entitlement to temporary total and temporary partial disability benefits. The employee cross-appeals from the judge's decision as to maximum medical

improvement. We affirm in part, reverse in part, and remand the matter for further proceedings.

BACKGROUND

The employee began working as a technician for Valvoline Rapid Oil Change [the employer] in July of 1997, performing oil changes and certain minor preventive maintenance, such as fluid level and tire pressure checks, on customers' vehicles.

On January 3, 1998, the employee fell at work, lacerating his scalp and apparently injuring his neck and back. The circumstances of the fall are disputed. The employee testified adamantly that he slipped on some fluid on the floor. According to other evidence, however, including contemporaneous medical records, the employee indicated to coworkers and medical personnel that he had been drinking alcohol the night before while watching movies and that he fell when he fainted or nearly fainted upon straightening up suddenly after working bent over, checking tires. The employee apparently struck his head on a car bumper or piece of shop equipment. Darryl Jonson, a long-time acquaintance of the employee's who later became an assistant manager at the employee's shop, testified that the employee told him a few days after the accident that he had been drinking both the night before and on the morning of the accident, before work. Mr. Jonson was not, however, present when the employee fell. Maurice Moore, another assistant manager, was working with the employee on the day of the accident and testified that he checked for but did not see any oil or fluid on the floor or on the employee's uniform after he fell. Mr. Moore also testified that, when he discussed the incident with the employee later, the employee "basically didn't remember it." Joel Powell, the station manager, testified that the employee told him that he had become faint and fell, cutting his head on something. Station surveillance cameras that might have captured the incident were accidentally allowed to record over the footage taken on the day of the employee's injury. In any event, shortly after the employee's fall, coworkers called for an ambulance, which took the employee to Fairview Southdale Hospital. The employee's scalp laceration was sutured, he was given medication, and he was advised to remain off work for forty-eight hours "then back to full duty if he feels up to it."

On January 15, 1998, the employee sought treatment at Hennepin County Medical Center [HCMC], complaining of head, neck, and lower back injuries that had occurred when he "slip[ped] and fell on wet surface or foreign object" at work. The employee's doctor, Mary Arneson, indicated that the employee could return to work with restrictions through January 22, 1998, on lifting, pushing, pulling, carrying, and awkward neck positioning. A few weeks later, on February 3, 1998, Dr. Arneson completed a Health Care Provider Report indicating that the employee had reached maximum medical improvement [MMI], with 0% permanent partial disability, effective January 29, 1998, and that no further treatment was planned.

The employee testified that the employer would not allow him to return to his job with any restrictions, but the evidence is again conflicting. Mr. Powell testified, for example, that the employee was not told he had to be free from restrictions before his return to work, only that the employer needed information from the employee's doctors as to what his restrictions were. A typed letter from the employer, hand-dated February 16, 1998, and apparently sent to the employee

by certified mail, advised that "we did have restricted duty available for you on January 15-22nd" and that the employer would need "permission from you[r] doctor before we can allow you to return to work." Mr. Powell also testified, however, that, in order to transfer the employee to another shop, which the employee had requested,[1] the employee would be required by a new area manager to be "a hundred percent on his . . . health." Further, a note made by Mr. Powell on February 22, 1998, indicates that the employee contacted him on February 21, 1998, to ask if he could come back to work and was told "he needed full recovery from doctors."[2]

On March 5, 1998, the employee was seen by Dr. Steven Lebow, complaining of various symptoms including low back pain and headaches. Dr. Lebow concluded that the employee had "perhaps some residual post concussive headaches [and] some musculoligamentous problems, especially in his low back," from an injury two months before, and he advised that the employee "could return to his regular job" but should start at four hours a day, working up to six and then eight hours. Dr. Lebow also indicated that the employee should undergo physical therapy and an aggressive exercise program, but he did not order such therapy because the employee had been "okayed by work comp for just one visit here."

In mid April 1998, the employee returned to his job on a work-hardening schedule as recommended by Dr. Lebow. Not long after, on April 23, 1998, the employee was suspended without pay for three days for a serious safety violation.[3] Then, on May 7, 1998, after his return following suspension, the employee was terminated for "insubordination" and "abusive behavior." Mr. Jonson testified that the employee had exhibited a "skunky" attitude about work after his injury and that, on the day of his termination, the employee had repeatedly used foul language to Mr. Jonson, within the hearing of customers, when Mr. Jonson asked him to start work a little early. Mr. Moore testified that the employee had used profanity to him in the same incident and had also said, "just fire me," "because it will look better on my court case." The employee had apparently not yet returned to full shifts at the employer by the date of his discharge.

The employee testified that he looked for work following his termination in the Midway District in St. Paul, applying with businesses at random, and in late May 1998, he obtained a full-time job with Hirte Transfer, moving furniture. The employee testified at hearing that he had no restrictions at the time but that he eventually quit his job with Hirte in July of 1998 because the work was too strenuous and aggravated his back and neck. In his post-hearing deposition, however, the employee testified that he had been terminated by Hirte for absenteeism and failure

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[1] Both the employee and Mr. Powell apparently anticipated tension with other employees over the employee's claim against the employer.

[2] In this same note Mr. Powell wrote that the employee offered to drop the "lawsuit" if the employer would pay him for 40 hours a week for the weeks missed from work.

[3] The employee apparently left the manhole cover off the waste oil storage tank, a deep reservoir for used oil. Mr. Jonson fell through the opening and was injured.

to call in.[4]

On June 9, 1998, while still employed by Hirte, the employee had been examined by Dr. Jack Drogt, the employer and insurer's independent medical examiner. Dr. Drogt concluded that the employee had sustained a concussion, a laceration, and a neck and back sprain/strain due to the fall at work; that the employee would have been partially disabled for three weeks after the incident, after which he could have worked without restrictions; that the employee had no objective findings on exam and no permanent partial disability; and that the employee had reached MMI on about January 28, 1998, consistent with Dr. Arneson's MMI report. Dr. Drogt's report was served and filed on July 14, 1998.

The employee's claim petition for wage loss and medical expenses came on for hearing, on hardship status, on July 28, 1998. The employer and insurer raised several defenses to the employee's claims, contending, among other things, that the employee had fallen for personal reasons unrelated to his employment; that the employee had no medical authorization to be off work after January 15, 1998; that the employee had no ongoing disability; that the employee had not conducted an adequate job search; and that the employee was not entitled to temporary total disability benefits after his May 7, 1998, termination, pursuant to Minn. Stat. § 176.101, subd. 1(e)(1). Whether the employee had reached MMI was also at issue. During the hearing, the compensation judge granted the employer and insurer permission to take the employee's post-hearing deposition and to obtain records pertaining to the employee's work for Hirte Transfer, of which the employer and insurer had been unaware prior to hearing. That deposition transcript was filed on October 30, 1998, and the record closed on November 5, 1998, upon receipt of counsels' written closing arguments.

In a decision issued on December 24, 1998, the compensation judge concluded that the employee had sustained an injury to his head and back arising out of and in the course of his employment on January 3, 1998; that the employee had been temporarily and totally disabled from January 4, 1998, through April 11, 1998, and again from May 8, 1998, through May 28, 1998; that the employee had been temporarily partially disabled from April 11, 1998, through May 7, 1998, and from May 29, 1998, through July 25, 1998; and that the employee had reached MMI on or before July 14, 1998. The judge denied the employee's claim for wage loss benefits after July 25, 1998, based on lack of evidence. Both parties appeal.

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

[4] As the employee explained it, he was terminated after he failed to report to work or call in while in jail over a weekend, and he had also missed work time from Hirte to attend the independent medical examination with Dr. Drogt, to see his lawyer, and to be with his fiancé when she had foot surgery.

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, "[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

1. Primary Liability

Much of the employer and insurer's defense to the employee's claim focused on evidence suggesting that the employee had been drinking alcohol the night before and possibly the morning of his fall at work. In discussing the employer and insurer's position, the compensation judge wrote, in part, in her memorandum as follows:

> The employee worked with other co-workers at Valvoline and apparently no one complained or noted the employee's behavior prior to the work-related fall. In fact, the employee began work at 8:00 that morning and fell around noon. It is simply unconvincing that the employee could show up at work, having been drinking, and would be allowed to work four hours into a shift and have a work-related injury before his supervisor would take any action. Given the fact that they were working on vehicles for the public and safety was a high concern and that power tools were being used, it is not reasonable to expect that the employer would have been so irresponsible as to allow an intoxicated employee to perform those duties for four hours, and have the employee fall over as a result of intoxication, before any measures are taken.
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> Testimony was offered concerning the work locations, the employee worked with other individuals, and the after-the-fact argument that the employee may have been drinking based on an assumption made by a witness, is not reliable. For this reason, the Court has disregarded the employer's claim that this employee fell as a result of drinking or intoxication.

On appeal, the employer and insurer contend that the compensation judge misconstrued their

defense, which was not intoxication but rather that the employee fell for reasons personal to him and not arising out of his employment, that is, a lack of sleep and alcohol consumption the night before and the morning of his fall, causing him to faint.[5] The employer and insurer appear to be correct on this point; the record indicates that the employer and insurer were not actually claiming that the employee fell because he was intoxicated.[6] However, whether or not it was necessary for the compensation judge to make findings regarding intoxication, she made other factual determinations that support her primary liability determination.

In her memorandum, the compensation judge wrote as follows:

> While performing [his] duties on January 3, 1998, in a standing position, the employee suddenly fell, landing in a horizontal position, striking his head and injuring his head and neck. The medical records vary as to whether or not the employee was conscious or semi-conscious. At any rate, an ambulance was called and the employee was taken to Hennepin County Medical Center, and the lacerations were treated. The medical records note the ambulance records state the employee had been drinking and watching movies the night before. The employee cannot explain exactly what happened, which is not surprising considering the fact he was in either a semi-conscious or unconscious state following the fall.
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> There was testimony that the workers at Valvoline must bend over to perform some duties and stand up quickly and that the floor contains oil and grease. These could have caused the employee's fall and it is unnecessary to determine whether or not it was the standing up quickly or the grease on the floor which resulted in the

[5] The employer and insurer allege that the compensation judge made other mistakes as to their position and as to the evidence, and there is some merit to some of these allegations. It is true, for example, that, contrary to the compensation judge's decision, there was evidence of personnel problems with the employee prior to the work incident, and that the employee was taken by ambulance to Fairview Southdale, not HCMC. While we acknowledge these and certain other factual errors by the compensation judge, these errors provide insufficient justification for reversal on appeal.

[6] In their post-hearing brief, for example, the employer and insurer relied on Koenig v. North Shore Landing, 54 W.C.D. 86 (W.C.C.A. 1996), a case in which the employee fell at work due to apparent alcohol withdrawal, to support their contention that the employee's injury in the present case was not causally related to his work.

> employee's fall. Clearly, one of them did and this employee sustained an obvious work-related injury to his head and back.

The employer and insurer contend that the compensation judge's conclusions as to the cause of the employee's fall are not supported by the evidence, noting, for example, that the ambulance crew noted no loss of consciousness and that witnesses to the employee's fall found no evidence of grease on the floor or on the employee's uniform. However, there is conflicting evidence on virtually every pertinent point. Several physicians concluded that the employee had suffered a concussion, and Mr. Moore testified that the employee seemed unconscious immediately after the fall. Mr. Jonson testified that he has cautioned employees to be careful straightening up after working bent over because standing up too quickly causes dizziness, which he had assumed was the cause of the employee's fall here. Moreover, while contending that the compensation judge's analysis failed to "take into consideration the fact that the employee had been drinking . . . and came to work without much sleep," the employer and insurer offered absolutely no medical evidence to support the conclusion that these facts, even if accurate, caused the employee to fall at work.

The compensation judge may have given the employee the benefit of the doubt here, but the record as a whole reasonably supports her alternative theories of compensability - - that is, it was not unreasonable for the judge to conclude that the employee either slipped on grease or fainted due to straightening up too quickly after working bent over - - both hazards connected to his work. While the evidence might also have supported some other decision as to causation of the employee's accident, we find no compelling reason to reverse the judge's finding of primary liability, and so affirm it.[7]

2. Wage Loss Benefits

The compensation judge's findings as to the employee's entitlement to temporary total and temporary partial benefits read as follows:

> 6. The employee was temporarily and totally disabled from January 4, 1998 through April 11, 1998, and again from May 8,

[7] At the very close of their argument on primary liability, the employer and insurer argue briefly that substantial evidence does not support the judge's conclusion that the employee injured his back in the fall. However, on this issue the employer and insurer contend only that the employee "did not identify a back injury as related to the January 3, 1998 head injury when he filled out the Employment Application at Hirte Transfer in May of 1998," and that, "[p]ursuant to the June 9, 1998 Independent Medical Examination Report of Dr. Jack Drogt, the employee did not sustain any injury to his low back as a result of that injury." The employer and insurer's characterization of Dr. Drogt's opinion is patently inaccurate. In his first conclusion, Dr. Drogt indicated that the employee "also sustained a paraspinal and lumbosacral spine strain/sprain as a result of" the January 3, 1998, fall. We see no need for further discussion on this point.

1998, through May 28, 1998.

> 7. From April 11, 1998 through May 7, 1998, while [at] Valvoline [and] from May 29, 1998, through July 25, 1998, while at Hirte, the employee was attempting to return to work subject to restrictions and limitations from his work-related injury of January 3, 1998. During that time, the employee sustained a wage loss and was temporarily and partially disabled.

Substantial evidence minimally but adequately supports the compensation judge's award of wage loss benefits through May 7, 1998, the date of his termination by the employer. Dr. Arneson placed specific restrictions on the employee through at least January 22, 1998, and then, in March of 1998, Dr. Lebow found continuing evidence of injury and restricted the employee's hours, to be increased gradually. By the time of his termination, the employee apparently had not yet returned to full shifts. While there may not be evidence clearly establishing formal restrictions set by physicians for the entire period between the date of the employee's injury and the date of his termination, it was not unreasonable for the compensation judge to conclude that the employee did in fact continue to be limited by his injury during this period. We therefore find insufficient grounds to reverse the judge's award of wage loss benefits through May 7, 1998. It appears, however, that the employee may in fact have had some earnings for a few days or partial days worked between January 4, 1998, and April 11, 1998, and the award of temporary total benefits during that period should be modified, if necessary, accordingly.

The judge's award of wage loss benefits after May 7, 1998, is more problematic. Despite employer and insurer's allegation that temporary total disability benefits were not payable after May 7, 1998, pursuant to Minn. Stat. § 176.101, subd. 1(e)(1), because the employee was fired for misconduct, the compensation judge made no finding on this issue.[8] As to temporary partial disability benefits, it is unclear on what basis the compensation judge concluded that the employee continued to have restrictions or limitations after May 7, 1998, affecting his earning capacity, due to the effects of the January 3, 1998, fall. There is no clear medical opinion to this effect. In addition, in her memorandum, the compensation judge indicated that the employee quit his job at Hirte Transfer on July 25, 1998, because of back and neck symptoms, while the employee acknowledged in his post-hearing deposition that he was terminated by Hirte on July 11, 1998, for absenteeism not caused by any continuing physical disability. In fact, the employee testified several times that he was not subject to any restrictions after he went to work for Hirte. At the very least, some explanation by the judge is necessary to reconcile the evidence and to provide a reasonable basis for review. We therefore reverse the judge's award of wage loss benefits after May 7, 1998, and remand for reconsideration and additional findings. On remand, the

[8] Minn. Stat. § 176.101, subd. 1(e)(1), indicates that temporary total disability benefits may be recommenced within one year following a return to work, prior to 90 days post-MMI, if the employee is laid off or terminated for reasons other than misconduct. See also Hughes v. Versa/Northern Iron, slip op. (W.C.C.A. Oct. 28, 1998).

compensation judge should consider application of Minn. Stat. § 176.101, subd. 1(e)(1), with regard both to the employee's termination by the employer and his termination by Hirte; the judge should reconsider and explain her conclusions as to the employee's restrictions and/or loss of earning capacity, if any, after May 7, 1998; and the judge should reconsider and make any modifications to her award necessary to reflect the employee's actual periods of employment. The judge may in her discretion require submissions by the parties to aid in her resolution of the issues on remand.

3. MMI

The compensation judge concluded that the employee had reached MMI by or before the July 14, 1998, service of Dr. Drogt's MMI opinion. Pointing to Dr. Lebow's recommendation for physical therapy and the employer and insurer's refusal to pay for treatment, the employee contends that substantial evidence does not support the judge's decision. We are not persuaded. As the compensation judge noted, the employee reported having symptoms only "every now and then" at his last visit to HCMC in April of 1998. Dr. Arneson indicated that no additional treatment was anticipated as early as late January of 1998, and Dr. Drogt concurred with Dr. Arneson's opinion that the employee had reached MMI by that time. Even Dr. Lebow, who recommended physical therapy, did not specify that any significant improvement was anticipated as a result of such treatment. A finding of MMI is one of ultimate fact, Hammer v. Mark Hagen Plumbing, 435 N.W.2d 525, 41 W.C.D. 634 (Minn. 1989), and, on this record, we cannot conclude that the compensation judge's finding on this issue is clearly erroneous and unsupported by substantial evidence.