JAMES J. WILLARD, JR., Employee, v. USX-MINNTAC, SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 9, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - CALCULATION. Where the self-insured employer failed to provide the number of days the employee worked during the 24 weeks prior to his work injury, the compensation judge was reasonable in simply calculating his weekly wage by dividing his total wages by 24.

JOB OFFER - REFUSAL; TEMPORARY TOTAL DISABILITY. Where the employee's physician had continued the employee off work until his next exam, the compensation judge was supported by substantial evidence in concluding that a job offer made prior to that date was not physically suitable such that the employee should be denied temporary total disability benefits through that date.

Affirmed.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Karen C. Shimon

OPINION

STEVEN D. WHEELER, Judge

The self-insured employer appeals from the compensation judge's calculation of weekly wage and from an award of temporary total disability compensation, contesting the finding that the employee was medically unable to return to work before April 7, 1998, and thus did not refuse an offer of physically suitable work. We affirm.

BACKGROUND

The employee, James J. Willard, Jr., sustained an admitted work-related injury on October 20, 1996, while employed as a train operator for the self-insured employer, USX-Minntac. At the time the employee was 25 years of age and had worked for the employer since June 1991. His regular shift was 8.3 hours, on a rotating shift, working seven consecutive days followed by several days off. For some time prior to the date of injury, the employee had also been working voluntary overtime when available, usually two or three times per week, up to about 15 hours per week. He was paid time and a half for overtime hours and double time and a half for work on

holidays. The employee's straight time rate of pay was apparently $17.29 which equated to a 40 hour weekly wage of $691.60. (Resp. Ex. 7.) (T. 14, 41-42, 51.)

The train operator job required the employee to drive a locomotive into the employer's taconite pit to be loaded and to haul the load of ore out to be dumped into a crusher. In the course of operating the locomotive, the employee was required to frequently climb down from the locomotive in order to throw switches which moved sections of rail to allow the locomotive to proceed along different sections of track. Some of the switches were electric, but many required the employee to manually reposition a three-foot-long steel lever which moved the rails by means of gears. In order to do this, the employee needed to bend at the knees, grab the lever, lift it up and pull it back over and down to the opposite direction. He testified that this action was very strenuous and required using all of the strength in his back, legs, and arms.

On October 20, 1996, after the employee had climbed down from the cab of his locomotive, he slipped on one of the many rocks which lay about in the pit. He fell, and felt a "pop" and pain in his back. (T. 14-25.) The employee was unable to get up. His foreman and some other workers assisted him out of the pit and he was taken by ambulance to the Virginia Medical Center in Virginia, Minnesota. He was diagnosed with possible disc herniations and was taken off work pending follow up with his physician, Dr. Mark D. Wagner. An MRI scan revealed bulging discs at L3-4 and L4-5 with ventral effacement of the dural sac. The employee subsequently treated with Dr. Wagner and with Dr. Jed Downs, a specialist in occupational medicine at the Duluth Clinic. In the fall of 1996 and during 1997, the employee was treated with injections, physical therapy, a brace, pain medications, anti-inflammatories, muscle relaxants, exercise, and chiropractic treatment. (T. 25-27; Exhs. H, I, J, K, 1, 6.)

About five weeks after the injury, the employee was released to return to work under restrictions. The employee was paid temporary total disability benefits from October 24 through November 30, 1996. He went back to the employer but because they had no work within his restrictions he was told to merely sit in the employer's rail annex during his work hours until mid-February 1997. During part of this time, the employee suffered a wage loss and was paid temporary partial disability benefits from December 22, 1996 through February 18, 1997, in the total amount of $2,852.26. He was released to work without restrictions effective February 20, 1997 and returned to operate a train, without wage loss, until mid-July 1997. The employee testified that the train operator work eventually became painful and aggravated his back. On July 18, 1997, the employee relinquished his union contract rights to the train operator position and accepted work for the employer as a maintenance laborer, which job allowed him to be more mobile and which he found easier on his back, although he found it necessary to take frequent days off work. (T. 27-34.) As a result of the job change, the employee's wages were lowered, but until November 20, 1997 the employer refused to pay temporary partial disability based on its position that the employee had voluntarily relinquished his job and had no material restrictions on his ability to work. After November 20, the employee had formal restrictions placed on his ability to work and the employer does not dispute the employee's entitlement to temporary partial disability benefits thereafter until he stopped working following a subsequent surgery in January 1998.

Apparently a dispute arose over whether the employer had calculated the employee's pre-injury weekly wage correctly and whether temporary partial disability benefits were being underpaid. The employee filed a claim petition on December 15, 1997 seeking temporary partial disability compensation after October 21, 1996 based on an alleged weekly wage of $961.53. The self-insured employer answered by contending that the employee's benefits had been appropriately paid based on a weekly wage of $823.60. (Judgment Roll.)

During 1997, the employee's back condition continued to deteriorate, causing compression of the L4-5 nerve root, and the employee underwent lumbar surgery by Dr. Scott Dulebohn on January 9, 1998. Dr. Dulebohn performed a laminectomy and discectomy from the L4 to S1 levels. During the surgery the employee was seen to have a large subligamentous disc herniation that had extruded caudally at L4-5, as well as a rent in the annulus at L5-S1 with a small subligamentous fragment tracking along the S1 nerve root. (Exh. 1, operative report of 1/9/98.)

Following the surgery the employee was released from work and continued under the care of Dr. Dulebohn. On February 18, 1998, the employee returned to see Dr. Dulebohn for a follow-up. Dr. Dulebohn's report to Dr. Wagner concerning this examination indicated that the employee was doing "extremely well," except for "the numbness that remain[ed] in the back of the thigh and down into the calf and big toe of the left foot." Dr. Dulebohn stated that he felt that this condition would "never completely resolve." Dr. Dulebohn indicated that in light of the employee's work as a laborer he was reluctant to send him back to work too quickly. He also stated that he had started the employee on six weeks of physical therapy and anticipated releasing him to a return to light-duty work at the time of the employee's next follow up appointment six weeks later. The employee's first physical therapy session was on February 24, 1998. (Resp. Ex. 1, Report of 2/18/98, see also Dr. Dulebohn's Report Work of Work Ability of 2/18/98 in Ex. H, and Dr. Wagner's Report of 4/1/98 in Ex. 1.)

The employee participated in a bowling tournament on February 21, 1998 in Ely, Minnesota, in which he bowled nine games. The employee was able to function well and placed second in the individual competition. The employer received an anonymous tip that the employee was involved in the tournament. The employer's manager of employee relations, safety and security, David Aagenes, went to Ely to observe the employee's physical abilities. The employer also retained an investigator to film the employee's participation in the tournament. (Pet. Ex. N; Resp. Ex. 13.) Based on his observations, Mr. Aagenes concluded that the employee ought to be able to come back to work. The employer prepared a job offer for a full-time return to work as a laborer "to do general manual labor in and about the facility," including "cleanup spills, hosing, load/unload supplies, dig/clean ditches, wash floors & windows and any other assignment made by supervisor." The offer was mailed to the employee on or about March 20, 1998 and requested that he begin as soon as possible, but no later than April 6, 1998. (T. 61-68, 74-81; Exh. 11.)

On March 24, 1998, apparently at the request of the employee, Dr. Dulebohn sent a letter to the employer's Employee Relations Department which stated that he would be seeing the employee in follow up on April 7, 1998. He stated that he believed that the employee "should

be able to return to light-duty work at that time" and would address the issue of a return to work at that time. The employee apparently also responded to the employer's attorney through his workers' compensation attorney who sent a letter to the employer's attorney indicating that a response to the job offer would have to await the advice of the employee's doctor after the April 7 appointment. (T. 81, Pet. Ex. M.) The employee did not return to work prior to his April 7, 1998 appointment. On April 7, 1998, Dr. Dulebohn released the employee to light-duty work with a 20-pound lifting restriction. The employee returned to the laborer job offered by the employer shortly after April 7. (T. 89.) He apparently continued to work in that position until at least the date of hearing below. (Exh. 1: 3/24/98 letter, 4/7/98 office note; T. 82, 89.)

A hearing was held on July 15, 1998 before a compensation judge of the Office of Administrative Hearings. In her Findings and Order, issued August 24, 1998, the compensation judge found that the employee's weekly wage was $962.57 on the date of injury and ordered the self-insured employer to pay temporary partial disability wage loss benefits based on that amount. The judge further found that the employee was temporarily totally disabled following his January 1998 surgery through April 7, 1998, when he was released to return to work by Dr. Dulebohn, and that the employee had not refused an offer of physically suitable work during this period. She also found that the employee had a 20% permanent partial disability of the whole body. The self-insured employer's notice of appeal indicates that all benefits awarded were appealed.[1]

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,

[1] Based on the issues briefed, the self-insured employer is deemed to have waived its appeal concerning the permanent partial disability award and the awards of periods of eligibility for temporary total disability and temporary partial disability benefits before March 20, 1998. Minn. R. 9800.0900, subp. 2. The issues which remained were the appropriate calculation of the employee's pre-injury weekly wage, resulting underpayment of temporary total disability and temporary partial disability benefits, and the award of temporary total disability benefits from March 20, 1998 through April 7, 1998. On appeal the employer also raised an issue concerning the apparent stipulation that any new weekly wage finding would be implemented "immediately." This issue is moot since we have honored the employer's appeal of the weekly wage issue.

"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

Weekly Wage

An injured worker's wage loss benefits are to be based on the employee's weekly wage at the time of injury. Minn. Stat. § 176.101, subd. 1. Where wages are irregular or difficult to determine, or where the employee works part time, wages are usually calculated according to the formulas contained in Minn. Stat. § 176.011. Under the formulas, a daily wage is first determined by dividing the total wages earned in the 26 weeks prior to the injury by the number of days in which the employee actually performed work. Minn. Stat. § 176.011, subd. 3. Weekly wage is then determined by multiplying the daily wage by the number of days or fractional days per week normally worked. Where this latter number is irregular, the days per week are calculated by dividing the number of days worked in the previous 26 weeks by the number of weeks in which work was actually performed. § 176.011, subd. 18. "Regular or frequent" overtime pay is to be included in the calculation. Id.

The wage records in evidence in this case consisted of a computerized summary from the employer's records which shows the total amount paid, Sunday premium pay, overtime earnings, total number of hours, and number of overtime or holiday hours for each of the pay periods over the 24 weeks prior to the employee's October 1996 work injury. (Resp. Ex. 7.) All of these categories varied greatly from one pay period to the next, ranging from a minimum of slightly more than 79 hours to a maximum of 104 hours in any one pay period. This information is consistent with the employee's testimony that he worked a rotating shift of seven days on duty followed by several days off. The employer did not offer any testimony to explain the figures on the summary. The employee testified that his regular daily shift prior to the date of injury was 8.3 hours, that he worked on a rotating shift basis with seven consecutive days on and several days off and that he had usually worked voluntary overtime two to three times per week up to about 15 hours per week. He was paid time and a half for overtime hours and double time and a half for work on holidays. (T. 14, 41-42, 51.) The summary does not indicate the number of days worked by pay period or in the aggregate.

The employee contended that the employee's weekly wage was best calculated by taking the total earnings during the 24 weeks prior to the injury and dividing by the total number of weeks worked. The self-insured employer advocated a method which involved dividing the total amount paid by the total number of hours worked and then multiplying the average hourly rate so obtained by 40 to obtain a weekly wage. (T. 7.) Based on the wage summary introduced by the employer, this method would have resulted in an hourly wage of $20.59 and a 40 hour weekly wage of $823.60. The self-insured employer's theory, although not explicitly stated at the hearing or in its brief, is based on the premise that the employee, on average, worked 40 hours per week. It argues that this approach combines the 40 hour basis on which the employee was scheduled to work with a recognition of overtime worked by using an increased hourly wage

calculated as a mix of straight time and overtime rates. (Resp. Ex. 7.) The compensation judge adopted the method proposed by the employee.

The question presented on appeal is whether the method employed by the compensation judge resulted in a wage determination which is a fair approximation of the employee's lost earnings. The primary issue is which of the two methods more reasonably reflects the overtime earned by the employee in the pre-injury period. The weakness of the self-insured employer's method, which does recognize the overtime earnings to some extent by determining the employee's average pay per hour, is its failure to multiply that blended hourly rate by the actual average number of hours worked per week. The compensation judge's method, however, implicitly includes the number of hours of overtime worked in the wage calculation. (Exh. 7.) The compensation judge's method seems to more accurately reflect the evidence that the employee actually worked more than 40 hours per week. In fact, the employee worked 46.75 hours per week, on average (1121.9 hours ÷ 24). Viewed simply on a mathematical basis the self-insured employer's method, were it compared to a calculation based on the number of days worked, assuming this was known, would almost certainly reduce the weekly wage determinations in every case involving overtime by a substantial amount, when compared with the statutory formula.

We note that the statutory method of first calculating the employee's daily wage was not possible because the evidence did not indicate the number of days worked. We have frequently stated that where a compensation judge does not have available the evidence upon which to make calculations based on the statutory formulas, alternate calculation methods are acceptable as long as they fairly and reasonably approximate the employee's lost earning potential. Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991); Decker v. Red Wing Shoe, 41 W.C.D. 763 (W.C.C.A. 1988). In making her determination, the compensation judge considered all the evidence available, including the employee's testimony and the wage data provided by the self-insured employer's exhibit. Without the ability to determine a daily wage, the compensation judge's choice of simply calculating an average weekly wage cannot be said to be unreasonable. We therefore affirm.

Temporary Total Disability Status/Job Offer

The compensation judge found that the employee was temporarily totally disabled from employment following his surgery in January 1998 until the date of his release to return to light-duty work by his treating surgeon on April 7, 1998.[2] The compensation judge further determined that the employee's failure to return to work pursuant to the employer's job offer during this period was not an unreasonable refusal of physically suitable work. She found that until his release the employee was under restrictions which would have precluded the work offered. The self-insured employer appeals only that portion of the temporary total disability award after its job offer on March 20, 1998 through April 7, 1998.

[2] For the period after the employee's return to work shortly after April 7 the compensation judge awarded temporary partial disability benefits, the entitlement to which is not contested.

In making her temporary total disability determination, the compensation judge adopted the medical opinion of the employee's treating physicians, Drs. Dulebohn and Wagner concerning the date that the employee was released to return to work. The self-insured employer's position, at trial and on appeal, is that the employee's ability to bowl nine games on February 21, 1998 sufficiently contradicts the employee's physician's release of the employee from work until April 7, 1998. Although the self-insured employer did not actually offer any medical testimony or opinion disputing Dr. Dulebohn's release from work through April 7, 1998, they contend that the evidence of the employee's bowling activities establish that the doctor's work release was based in an incomplete understanding of the employee's actual physical abilities and was thus without adequate foundation. They further argue that the employee's bowling activities are "common sense" evidence of his ability to perform the job they offered him after March 20, 1998. (ER brief at pp. 7-8.)[3]

The employee testified that he had previously discussed his bowling activities with his doctors and that they were both aware of and supported his participation in this activity following the surgery. (T. 37-39, 44-46.) Although the records of the employee's doctors for the post-surgery period do not mention a discussion about the employee's bowling activities, the compensation judge was free to accept the employee's testimony. As the acceptance of that testimony was a matter of witness credibility, we cannot say that the compensation judge committed clear error in so doing, and we must affirm. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989).

Accepting that the employee's physicians were aware of and approved of the employee's participation in bowling activities, we must also affirm the compensation judge's adoption of the views of those physicians as to the appropriate restrictions and date of return to work for the employee, as there is no foundational defect. We cannot say that the compensation judge committed clear error in concluding that the evidence of the employee's participation in several games of bowling did not compel the contrary conclusion that he was medically capable of sustained employment on a full-time basis. We, therefore, must affirm.

[3] The self-insured employer contends that the compensation judge incorrectly compared the employee's bowling activities to the requirements of his train operator job. We agree that the compensation judge's memorandum does make such a comparison. If that were the only basis for the compensation judge's decision we would probably remand for the compensation judge to analyze the employee's abilities based on the laborer job offered on March 20, 1998. In her findings, however, it is clear that the compensation judge found that the employee's bowling on one day was not sufficient evidence that the employee was capable of working in a full-time basis at any job.