LAWRENCE H. WIRTZ, Employee/Appellant, v. INDEP. SCH. DIST. #625, SELF-INSURED/PREFERRED WORKS, INC., Employer, and NEUROPHYSIOLOGICAL INST., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 9, 1999

No. [REDACTED SSN]

HEADNOTES

CAUSATION - SUBSTANTIAL EVIDENCE; EVIDENCE - EXPERT MEDICAL OPINION. Substantial evidence did not support the compensation judge's decision that the employee did not sustain a work-related low back injury in a 1986 work accident, where the expert opinion accepted by the judge was based on inaccurate assumptions, and where the remainder of the record compelled the conclusion that the employee injured his low back in the incident as claimed.

PERMANENT PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert opinion, supported the compensation judge's conclusion that the employee's cervical permanency was properly ratable at 10.5%, but the matter was remanded to the judge to determine the extent of the employee's work-related lumbar permanency, if any.

CAUSATION - PSYCHOLOGICAL CONDITION. Substantial evidence, including expert opinion, supported the compensation judge's decision that the employee did not sustain a consequential psychological injury as a result of his physical work injuries.

JOB OFFER - PHYSICAL SUITABILITY; PRACTICE & PROCEDURE - REMAND. Where adequate review was not possible without specific findings as to physical and psychological suitability of the employee's post-injury job as a hall monitor/greeter, the matter would be remanded for reconsideration and further findings.

TEMPORARY PARTIAL DISABILITY; PRACTICE & PROCEDURE - REMAND. Where the compensation judge denied the employee's temporary partial disability underpayment claim on a basis not asserted by either party, the issue would be remanded for reconsideration and further findings.

Affirmed in part, reversed in part, and remanded.

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

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's findings that the employee did not injure his low back at the time of his work injury; that a hall monitor/greeter job was suitable employment; that the employer overpaid permanent partial disability benefits; that the employer did not underpay temporary partial disability benefits; and that the employee did not sustain a consequential psychological injury as a result of the work injury. We affirm in part, reverse in part, and remand.

BACKGROUND

The employee began work for Independent School District #625 [the employer] in 1984 as a light-duty, part-time custodian, eventually moving into full-time custodial engineer work. On April 11, 1986, he sustained a work-related injury when a large wooden cabinet fell onto him, pinning him against a wall. On October 2, 1987, the employee began treating with the Pain Assessment and Rehabilitation Center. At that time, he gave a history of experiencing immediate pain in the head, neck, upper and lower back, and shoulder after the work injury. Dr. Harvey Aaron noted that the employee was being treated for depression and diagnosed strain/sprain syndrome of the cervical, thoracic, and lumbosacral areas, bilateral sciatica of undetermined etiology, "apparent" right shoulder derangement, and muscle contracture headaches. A CT scan of the lumbar spine and ultrasound of the right shoulder were ordered, and the employee continued to treat with Dr. Aaron thereafter.

The employee returned to light-duty work with the employer following his injury and in June of 1988 sustained an injury to his knee, which he did not report to the employer. When seen by Dr. Aaron in August of 1988, the employee complained of neck and shoulder pain and problems with the low back, including a burning sensation down the outside of his right leg. By September of 1988, the employee had apparently been taken off work by his chiropractor.[1] On May 3, 1989, Dr. Aaron released the employee to return to work four hours per day for two weeks, then six hours per day for two weeks, then full time. However, on June 7, 1989, Dr. Aaron recommended that the employee continue to limit his working hours to four hours per day because of continuing shoulder discomfort. Again on July 12, 1989, Dr. Aaron restricted the employee to half-time work and recommended that the employee avoid working with his arms in an elevated position. Then, nearly a year later, on June 28, 1990, Dr. Aaron took the employee off work until his right shoulder problems could be resolved.

In November of 1990, the employee underwent arthroscopic reconstruction of his right rotator cuff complex, performed by Dr. Donald Miller. Dr. Miller released the employee to return to a "one-handed job" in April of 1991. The employee apparently returned to work with the employer, but Dr. Miller removed him from work again in June of 1991 to treat cervical and right shoulder symptoms. In October of 1991, Dr. Miller opined that the employee was at maximum medical improvement [MMI] with respect to his cervical and right shoulder problems

[1] The chiropractor's records were not introduced into evidence, but this notation is contained in the September 29, 1988, report of Dr. Aaron.

but that the employee could not work as a custodian and was restricted from repetitive reaching, from frequent use of the right arm at chest level or higher, and from static positioning of the cervical spine for any prolonged periods.

The employee had been seen by Dr. Charles Ormiston in September of 1991 for evaluation of neck and arm pain. Dr. Ormiston's office notes for February 17, 1992, indicate that a Functional Capacities Evaluation [FCE] had been performed and that the employee was released to job search within those restrictions.[2]

On March 15, 1992, the employee began work with Middle East Bakery, where he sorted and packaged bread. He apparently worked twenty hours a week in that position. In January of 1994, the employee was seen at Group Health, complaining of intermittent jabbing right upper extremity pain. The employee indicated at the time that his repetitive work at the bakery exacerbated his symptoms. The employee returned to Dr. Ormiston on March 2, 1994, complaining of persistent neck pain with increased pain in the right elbow and hand. The employee also reported that the bakery was not heeding his restrictions. On exam, Dr. Ormiston noted "touch-me-not tenderness" in the employee's neck, he ordered a repeat MRI of the neck and right shoulder, and he referred the employee for a neurosurgical evaluation. Two days later, on March 4, 1994, the employee was evaluated at United Hospital Pain Clinic for chronic right shoulder and "multiple pain complaints." He was again taken off work at that time.

The employee saw Dr. Walter Bailey on March 15, 1994, complaining of right upper extremity pain and intermittent numbness in his fingers. Dr. Bailey reviewed an MRI of the employee's cervical spine and opined that he would not consider surgery. He noted that the employee was not happy with that answer and was going to go back and see Dr. Ormiston. At some point, the employee apparently returned to work at the bakery.

In May of 1994, Dr. Ormiston referred the employee to United Occupation Health. The employee was taken off work for two weeks and told to engage in a home exercise program. Further evaluation of the right shoulder was recommended. Rehabilitation services were reinstituted for the employee in October of 1994. QRC Becky Deneen initially performed medical monitoring on the file.

In December of 1994, the employee began treating with Dr. A.V. Anderson at the Pain Assessment and Rehabilitation Center. Dr. Anderson opined that the employee was not capable of any kind of work at that time. When he saw the employee again on January 11, 1995, Dr. Anderson referred him for a surgical consultation. The employee saw Dr. Timothy Garvey on February 6, 1995, and Dr. Garvey opined that the employee had chronic neck and upper extremity pain in relation to cervical degenerative changes. He did not recommend surgery at

[2] This FCE was not offered into evidence at the hearing but is contained on the judgment roll. The FCE stated that the employee could "tolerate 4 hr/day with 1 hr. increases every 1.5 - 2 mos."

that time but opined that surgery might become a "quality of life issue" in the future.

Dr. David Boxall performed an independent medical examination on February 27, 1995. In his report of that date he opined, in part, that the employee had reached MMI. The parties stipulated that the employee reached MMI effective with service of this report on the employee on March 9, 1995.

In April of 1995, the employee applied for the job of hall monitor/greeter with the employer. A May 16, 1995, report of QRC Deneen reflects that she compared the written description of the physical requirements for the hall monitor/greeter position with the employee's 1992 FCE and found that "it appeared to match very well." She apparently also provided the employer with a doctor's work restriction limiting the employee to no more than four hours of work per day.[3] On May 1, 1995, Dr. A.V. Anderson signed the job description, stating that the job "appears appropriate" for the employee and that "[the employee] should try it on a trial basis and I would like to see him for an exam after 3 weeks on the job to see how he is doing medically." The job of hall monitor/greeter was offered to the employee in writing on June 7, 1995. The job as offered was for 37.5 hours per week; however, Paul Paulsen, supervisor of safety and security for the employer, testified that he knew the employee was only released to part-time work at that time.

The employee began part-time work on June 27, 1995, and immediately began reporting to his QRC that the job required more walking than the job description had indicated. A few weeks later, on July 18, 1995, the employee was seen by Dr. Kevin Kavaney, a psychiatrist at St. Paul Ramsey, exhibiting severe depressive symptoms. The employee reported that he was continuously fearful about confrontations on the job and that he was experiencing weight loss, insomnia, decrease in concentration, increased sadness, irritability, and suicidal ideation. The doctor prescribed antidepressants and opined that the position as a hall monitor "maximizes a lifelong fear of having to face confrontations . . . ."

QRC Deneen retired, and the file was taken over by QRC Linda Sourbis, who first met with the employee on August 16, 1995. At that first meeting, the employee complained that he had a great deal of concern about his personal safety in the hall monitor/greeter position. He stated that he had to confront teenagers and adults on a regular basis concerning violations of school rules. Also in August of 1995, the employee returned to Dr. Anderson, complaining of increased pain in the neck and both arms over the past month. Dr. Anderson noted that the employee had been working four hours per day for six weeks. It was Dr. Anderson's opinion that the majority of the employee's problems were coming from the cervical spine, and he recommended a discogram. On September 6, 1995, Dr. Anderson advised the employee to remain at four hours per day, and he repeated that restriction on September 13, 1995.

[3] This information is contained in the August 31, 1995, report of QRC Sourbis. The actual doctor's restriction was not offered at the hearing.

On September 12, 1995, the employer wrote to QRC Sourbis informing her that "the present job offered that the employee is working in at the present time is a suitable job and he should be working the 37 1/2 hours per week as required," pointing out that none of the treating doctors had placed restrictions on the employee's hours until the employee began treating with Dr. A.V. Anderson. The employer paid the employee temporary partial disability benefits based on full-time employment throughout the period that he worked part-time in the hall monitor/greeter position. In response to a November 6, 1995, letter from employee's counsel, Dr. Anderson noted that the employee's job with the employer was outside his physical restrictions, explaining "[h]e is in danger of physical confrontation which would cause possible injury or aggravation." The employee left the job in January of 1996.

Dr. John Rauenhorst performed a psychiatric examination of the employee on November 25, 1997, at the employer's request. In his report of December 9, 1997, he opined that the employee had "a long history of a significant psychiatric disorder" and that the employee's work injuries were not substantial factors in the development of his psychiatric problems. It was Dr. Rauenhorst's opinion that the psychiatric disorder was "probably contributing to his complaints of pain."

Dr. John Cronin performed a psychological evaluation of the employee and in his report of September 8, 1998, he opined that the employee had "an emotional reaction to the injury, including depression and anxiety, which is having a direct impact on his recovery." He further opined that the employee suffers from chronic pain syndrome.

The pertinent procedural history in this matter goes back to 1992. In May of 1992, the employee filed a claim petition seeking payment of benefits for a 21.43% whole body impairment as a result of a work injury to the neck, back, shoulders, and arm. The employer answered, admitting injury only to the cervical spine, right shoulder, and upper back. A stipulation for settlement was entered into in May of 1995, wherein the bill of Dr. A.V. Anderson was settled. The remainder of the case proceeded to hearing, and on June 21, 1995, findings and order were filed indicating that the parties had stipulated that the employee had sustained a 21.21% whole body impairment, and finding that notice of MMI was served March 9, 1995, and that, at the time of the May 2, 1995, hearing, it was premature to determine whether permanency benefits were payable as economic recovery compensation [ERC] or impairment compensation [IC]. The employer subsequently made payment of IC. On July 9, 1997, the employee filed a claim petition seeking payment of temporary partial disability benefits from June 26, 1995, to February 16, 1996, and permanency benefits as ERC rather than IC. In an amended claim petition filed on January 27, 1998, the employee added a claim for temporary total disability benefits from March 23, 1994, and forward.

The claim petitions proceeded to hearing on October 20, 1998, at which time the employee was claiming a low back injury and consequential psychological injury as a result of the April 11, 1986, work injury; an additional 10.5% permanent partial disability related to the low back; ERC rather than IC benefits; an underpayment of temporary partial disability benefits; and payment of certain medical bills. The employer was claiming, in part, that it had overpaid

permanency benefits, in that the employee had only a 13.185% whole body disability. In findings filed on January 11, 1999, the compensation judge found, in part, that the employee did not sustain a low back or consequential psychological injury as a result of his 1986 work injury, that the employee had sustained only a 13.185% whole body disability, that the employer was entitled to a credit for an overpayment of permanency,[4] that the hall monitor/greeter position was suitable employment and that the employee was therefore entitled to IC rather than ERC benefits, that the employee had not been underpaid temporary partial disability benefits because the employee's reduction in earnings was not causally related to his work injury, and that only certain of the employee's medical bills were compensable. The employee appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether "the findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1 (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

Low Back Injury

In her memorandum, the compensation judge gave the following rationale for her finding that the employee did not establish that his low back condition was causally related to the work injury:

> Mr. Wirtz did not report any low back complaints when he saw Dr. Boxall on February 27, 1995, though he was specifically questioned about the body parts injured in the accident. I find Dr. Boxall's opinion more persuasive. The employee did not consistently report or complain of low back pain following the

[4] There is no argument on appeal that the prior stipulation of 21.21% permanent partial disability is res judicata.

April 11, 1986 injury.

A trier of fact's choice between expert opinions is generally upheld unless the facts assumed by the expert are not supported by the evidence. Nord v. City of Cook, 360 N.W.2d 337, 37 W.C.D. 364 (Minn. 1985). The employee contends that the facts assumed by Dr. Boxall in rendering his opinion are not supported by the evidence. We agree.

Dr. Boxall's report of February 27, 1995, indicates that the employee made no complaints of low back pain at that time. However, the medical records reviewed by Dr. Boxall reflected that a CT scan of the low back on October 9, 1987, had shown bulging at L4-5. When Dr. Boxall re-examined the employee on December 27, 1995, the employee gave the doctor a history of injuring his low back in the work incident when the cabinet fell on him. The employee complained of low back pain and intermittent pain and numbness in his legs. Dr. Boxall opined that the employee's low back examination findings were not consistent with a bulging disc at L4-5. Following a third exam on October 28, 1997, Dr. Boxall found no changes from his previous exam. In his October 15, 1998, deposition, Dr. Boxall testified on direct examination that he did not think that the 1986 work injury was a substantial contributing factor in the employee's low back condition because, when he saw the employee in February of 1995, the employee did not mention an injury to the low back, "[s]o those [complaints] seem to have appeared sometime between when I saw him in February of '95 and when I saw him in December of 1995." On cross examination, Dr. Boxall testified that, from his review of the medical records, there was no documentation of low back complaints or findings relative to the low back prior to 1995. This is clearly inaccurate. The records of Dr. Aaron, Dr. Miller, Dr. Baker, Dr. Ormiston, Dr. Bailey, and the Center for Diagnostic Imaging, prior to 1995, all contain references to low back pain, which the employee related to his work injury. Dr. Boxall clearly made inaccurate assumptions in rendering his causation opinion. In addition, an employee's failure to consistently report complaints of pain after an injury provides only minimal support for a finding that an injury did not occur. Symptoms may be temporary or intermittent.

The employee testified that he had pain in his low back within four to five hours of the work injury and that he was still having low back problems when he left the employer in 1988. Medical records reflect intermittent complaints of low back pain and treatment from 1987 forward. Dr. Anderson opined that the employee sustained an injury to his low back in the 1986 work accident. While, under other circumstances, we might have remanded the issue to the judge in light of our conclusions as to Dr. Boxall's opinion, we are satisfied that the record as a whole compels the conclusion that the employee did sustain a low back injury in the 1986 work incident. We therefore reverse the judge's finding on this issue. However, we make no finding as to whether the employee's current complaints, if any, are causally related to the 1986 work injury, or whether that low back injury was temporary or permanent.

Permanent Partial Disability

The employee contends that the compensation judge erred in finding that the employee had sustained only a 13.185% whole body impairment. There is no dispute over the

judge's award of 3% for injury to the shoulder; the dispute is whether the employee qualified for 19% or 10.5% for the cervical spine and whether the employee is entitled to permanency benefits for the lumbar spine injury.

With regard to the cervical spine, the compensation judge adopted the opinion of Dr. Boxall, who indicated that the employee did not have cervical herniations but was properly ratable at 10.5%, for degenerative changes at multiple vertebral levels pursuant to Minn. R. 5223.0070, subp. 2.A.(3)(b). Dr. Boxall testified that his findings on neurological exam revealed inconsistent and nonanatomical decreases in pin prick, that he had reviewed the films of the cervical spine, and "there are no herniations in the cervical spine." In addition, Dr. Bailey interpreted the 1994 MRI as being normal, with the exception of foraminal stenosis on the right at C6-7. In his reports of April 8, 1994, and November 4, 1994, Dr. Bailey found no evidence of radiculopathy. This evidence adequately supports the compensation judge's conclusion that the employee did not sustain three herniated cervical discs as claimed, and we therefore affirm the judge's finding of 10.5% permanent partial disability related to the cervical spine.

The compensation judge made no findings regarding permanent partial disability related to the low back because she had found that the employee did not sustain a low back injury in 1986. Having reversed that causation finding, we remand the matter to the compensation judge to determine whether the employee is entitled to benefits for permanent partial disability related to that low back injury.

Consequential Psychological Injury

The employee had a history of psychological problems dating back to 1975, when he was hospitalized for suicidal ideation, depression, and anxiety neurosis. The compensation judge found that the employee did not sustain a consequential psychological injury arising out of and in the course and scope of his employment. In her memorandum, the judge noted that she found Dr. Rauenhorst more persuasive than Dr. Cronin. The employee contends that "Dr. Cronin's diagnosis makes the most sense considering the relevant evidence."

The question on appeal is whether substantial evidence supports the judge's finding, and, in this case, we find that it does. Dr. Rauenhorst conducted an extensive psychiatric examination of the employee and reviewed medical records from twenty-nine providers. He diagnosed the employee as suffering from a depressive disorder that pre-existed his work injury and that has multiple causative factors. In his deposition, he testified that neither the employee's work injury nor his work activities were a substantial contributing factor in causing or aggravating his depressive disorder. Dr. Rauenhorst also disagreed with Dr. Cronin's conclusion that the employee suffers from chronic pain syndrome caused by the physical injuries sustained in the 1986 work injury. Instead, Dr. Rauenhorst is of the opinion that the employee's pain is secondary to his depression.[5]

[5] Dr. Marvin Logel, licensed psychologist, examined the employee on the employer's behalf on January 16, 1996. He reached a similar conclusion. In his report of January 31, 1996,

The employee does not question the foundation for Dr. Rauenhorst's opinions. Rather, he argues that Dr. Cronin's opinions make more sense. However, a trier of fact's choice between expert opinions is generally upheld where the facts assumed by the expert in rendering his opinion are supported by the evidence . Nord, 360 N.W.2d 337, 37 W.C.D. 364. There is ample evidence in the record of the employee's pre-existing psychological problems. We therefore affirm the judge's finding that the employee did not sustain a consequential psychological injury as a result of the 1986 work injury.

Suitability of Hall Monitor/Greeter Position

One of the issues before the compensation judge was whether the hall monitor/greeter position offered to the employee on June 7, 1995, was suitable employment. The judge's finding on this issue is determinative of whether permanent partial disability benefits are payable as ERC or IC. See Minn. Stat. § 176.101, subd. 3e(b) (repealed 1995). Contained within "conclusion of law" number three is the judge's finding that "[t]he job offered on June 7, 1995 was suitable." However, there is no discussion or explanation in her memorandum as to how she reached that conclusion.

The evidence on this issue is conflicting. There are suggestions that the job might not have been physically suitable, in that it required more walking and stair climbing than the FCE had recommended.[6] On the other hand, Dr. Anderson released the employee to try this work in June of 1995, and, in November of 1995, when he opined that the job was not suitable for the employee, he did so not because of walking or stair climbing but because of the risk of confrontations. The employee continued, however, in the job until January of 1996.

In addition, there is a question as to whether the job was suitable from a psychological standpoint. While we have affirmed the judge's finding that the work injury did not cause or aggravate the employee's pre-existing psychological condition, the employer takes the employee as it finds him and must take pre-existing conditions into account when making an offer of employment. There is a suggestion in the medical records that the employee has had issues regarding confrontations in the past. The judge specifically found that the employee had verbal confrontations with students in the hall monitor/greeter job and that he frequently broke up fights. Dr. Logel opined that the employee "is not well-suited to work in his current position as a greeter/hall monitor by virtue of specific aspects of his personality reflecting conflicts related to aggression."

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he opined that the employee's psychiatric disorders "are a reflection of psychiatric difficulties concurrent with but independent of the medical disorders associated with [these] work-related injuries. It is my opinion that his physical symptoms are exacerbated by his psychiatric illnesses but his psychiatric illnesses are neither the direct nor the indirect result of his work-related injuries."

[6] This notation is found in QRC Deneen's July 5, 1995, report.

Given the conflicting evidence, adequate review is not possible without specific findings on the physical and psychological suitability of the hall monitor/greeter job. We therefore remand this file to the compensation judge for reconsideration and further findings on the issue. The findings and order on remand should also contain a specific finding as to whether permanent partial disability benefits are payable as ERC or IC. Either party may, of course, appeal from the judge's findings on these issues.

Temporary Partial Disability Benefits

The employee claims entitlement to an underpayment of temporary partial disability benefits paid during the period in which the employee was working as a hall monitor/greeter. The employee and employer clarified at oral argument that the employee was paid temporary partial disability benefits based on full-time post injury employment, although he never worked more than four hours per day in the hall monitor/greeter job. The compensation judge found, "[t]he self-insured employer did not underpay temporary partial disability from June 24, 1995 through January 19, 1996. The employee's reduction in earnings is not causally related to his work injury." We find insufficient explanation for this conclusion and remand this issue also for reconsideration and additional findings.

Pursuant to Dorn v. A.J. Chromy, 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976), an employee is eligible for temporary partial disability benefits if he has a physical disability related to the work injury, he can work subject to the disability, and there is an actual loss of earning capacity related to the disability. Actual earnings are generally presumed to be a fair measure of earning capacity. Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 314 (1960).

The employee in the instant case has, at minimum, a 13.185% whole body impairment.[7] Virtually all doctors have placed physical restrictions on the employee's work activities, and the employee was working at a wage loss in the hall monitor/greeter job. The judge's finding that the employee's reduction in earnings is not causally related to his work injury suggests that the employee was not temporarily partially disabled while working as a hall monitor/greeter. This is clearly contrary to the evidence and was not the issue before the judge. We therefore vacate the judge's findings regarding temporary partial disability benefits and remand for reconsideration and additional findings. The judge is to determine whether the employer underpaid temporary partial disability benefits by basing those benefits on full-time employment rather than the employee's actual part-time hours. Additional findings should of necessity include a finding as to whether the employee was capable of full-time employment as a hall monitor/greeter. With this issue, as with all others, we leave it to the judge to decide whether to receive additional argument, testimony, or evidence.

[7] Excluding permanent partial disability, if any, related to his low back condition, to be determined by the judge on remand.