

JOHN F. WOHLWEND, Employee/Appellant, v. INDEP. SCH. DIST. #709, SELF-INSURED, adm'd by BERKLEY ADM'RS, Employer, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 19, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - REMAND; EVIDENCE - ADMISSION; CREDITS & OFFSETS - CREDIT FOR OVERPAYMENT. The compensation judge did not err in declining to allow additional evidence, on remand, and substantial evidence amply supports the judge's decision that the employee was not totally disabled, due to his work-related condition, during any period in which temporary total benefits were paid, entitling the employer to a credit under Minn. Stat. § 176.179.

Affirmed.

Determined by Wilson, J., Hefte, J., and Pederson, J.
Compensation Judge: Gregory A. Bonovetz.

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's award, on remand, of a credit for temporary total disability paid by the self-insured employer following the employee's work-related automobile accident, arguing that the judge erred by making such an award without taking additional evidence and that substantial evidence does not support the judge's decision. We affirm.

BACKGROUND

On September 1, 1993, the employee was involved in a work-related automobile accident while employed as an assistant principal by Independent School District #709 [the employer] in Duluth. Shortly after the accident, the employee drove himself to St. Mary's Hospital, where he was seen in the emergency room. The physician's report from St. Mary's indicates that the employee was complaining of neck pain and that he was given several prescriptions and an information sheet covering "head injury/neck whiplash."

The employee saw his usual family physician, Dr. C. M. Scott, two days after the

accident, reporting having done some “illogical things” recently, and Dr. Scott eventually referred him for a neurological consultation, noting that the employee was “having some memory lapses.” The employee subsequently underwent extensive neuropsychometric testing and was evaluated by a number of specialists, several of whom concluded that he had sustained a traumatic brain injury, with resulting cognitive impairment, as a result of the September 1, 1993, collision. Complaints apparently related to the employee’s cognitive impairment include difficulty understanding people, stuttering, memory deficits, word-finding problems, and confusion. The employee received medication and “cognitive retraining” for his cognitive impairment as well as physical therapy and other care in treatment of his neck pain and continuing headaches. He has not worked as a teacher or assistant principal since early September 1993, when the employer began paying him temporary total disability benefits. At least two of his physicians have concluded that the employee is totally unemployable.

The matter initially came on for hearing before a compensation judge on December 17, 1996. The evidence submitted at that hearing included extensive treatment records and the deposition testimony of several physicians. In his decision issued on February 13, 1997, the compensation judge indicated that the issues presented at the hearing were whether the employee had sustained a closed head injury in his September 1, 1993, work-related accident; whether the employee had been permanently and totally disabled since the date of the accident; whether the employee’s medical care had been reasonable and necessary; and “whether some or all of the previously paid temporary total disability benefits were paid under a mistake of fact.” In his findings, the compensation judge concluded that the employee had not sustained a closed head/brain injury as claimed; that the employee had sustained a cervical strain; and that, while the cervical strain had resolved within a “matter of months,” there was insufficient [evidence] to permit a determination as to whether and when any temporary total disability attributable to the cervical strain would have ceased.” The judge therefore denied the employee’s claim for additional benefits and “[made] no finding with regard to the self-insured employer’s claim of a ‘credit’ for overpayment of temporary total disability.”

After both parties appealed from the compensation judge’s decision, the Office of Administrative Hearings indicated that it had been unable to locate the audiotapes from the hearing, meaning that no transcript could be prepared. The employee then moved this court for an order referring the matter for a new trial. We denied that motion and instead directed the compensation judge to prepare a “statement of proceedings from the best means available, including recollection,” pursuant to the procedures described in the rules for civil appellate procedure.¹ After submissions and arguments by both parties, the compensation judge issued his formal statement of proceedings, adopting the employee’s deposition testimony, as proposed by the employee, subject to certain modifications proposed by the employer.

In our decision on the parties’ appeals, issued January 29, 1998, this court

¹ Minn. R. Civ. App. Pro. 110.03. See also Moulzolf v. Pierz Marine, Inc., slip op. (W.C.C.A. Sept. 22, 1994).

concluded that the record, including the judge's statement of proceedings, was adequate to allow "the question[s] on appeal [to be] adequately presented without the missing transcript,"² and we therefore reaffirmed our earlier order denying the employee's motion for a new trial. With regard to the substantive issues, we affirmed the judge's factual decision that the employee had not sustained a traumatic brain injury as a result of his September 1, 1993, work-related automobile accident, but we remanded the matter for reconsideration and determination of the employer's credit claim for overpayment of temporary total disability benefits. Wohlwend v. Independent School Dist. #709, slip op. (W.C.C.A. Jan. 29, 1998).

On June 1, 1998, following our decision, the compensation judge wrote to the parties, indicating that he did "not intend to accept additional evidence" but that he would accept written closing arguments on the remanded issues. The employer submitted such an argument; the employee did not. In a decision issued on August 12, 1998, the compensation judge resolved the credit issue in the employer's favor, concluding that the employee had not been totally disabled due to his cervical strain at any time subsequent to the September 1, 1993, accident and that the employer was therefore entitled to a credit for all temporary total disability benefits paid after that date. 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

Procedure - Additional Evidence

The employee argues initially that the compensation judge erred by failing to allow additional evidence on remand, given the judge's acknowledgment in his original decision that the

² Quoting Soukup v. City of Sleepy Eye, 281 Minn. 144, 146, 161 N.W.2d 36, 37 (1968).

“evidence was insufficient” to permit a determination of the employer’s credit claim, and given that the trial transcript was not available. We are not persuaded.

In our first decision in this matter, we wrote as follows with regard to the employer’s credit claim:

In Finding 11, the compensation judge concluded that the employee had sustained a cervical strain in his work-related accident and that, “[w]ithin a matter of months, the cervical strain had resolved.” In Finding 17, however, the compensation judge concluded that “the evidence is insufficient to permit a determination as to whether and when any temporary total disability attributable to the cervical strain would have ceased,” and the judge therefore “[made] no finding with regard to the self-insured employer’s claim of a ‘credit’ for overpayment of temporary total disability.” Both parties appeal, and, after review of the findings and the entire record, we conclude that the matter must be remanded. Not only do the findings quoted above appear inconsistent, but the current record appears to contain evidence that would be sufficient, if accepted by the judge, to support a conclusion either way as to whether the employee continues to experience disabling symptoms related to his cervical strain. We also note that it is the employer’s burden to prove entitlement to a credit, see, e.g., Carlson v. Minnesota Dance Theatre & School, [citation omitted] (W.C.C.A. Nov. 24, 1986), and that, if the employer did not meet that burden, the credit claim should simply have been denied. We therefore remand the matter for reconsideration and resolution of the issues of the duration of the employee’s cervical strain and the employer’s entitlement to a credit.

The language emphasized above evidences our conclusion that the existing record was in fact sufficient to permit determination of the employer’s credit claim, and our opinion on that point has not changed. Moreover, given our explanation as to the burden of proof, the employee surely would have had more legitimate grounds for complaint had the employer been allowed to submit additional evidence to prove its case. We also note that the employee did not object when the compensation judge indicated he would not accept more evidence and that the employee did not take the opportunity to submit a closing argument, on the credit claim, to the judge.

The employee’s argument on this issue is in essence a repeat of his earlier request for a new trial. We have already rejected his position in that regard. The employer’s claim for a credit was expressly listed as an issue to be determined at the original hearing, and the evidence submitted at that time was adequate both to allow the compensation judge to decide the claim and to allow proper review on appeal. We therefore hold that the compensation judge did not err by declining to allow submission of additional evidence.

Credit Claim - Substantial Evidence

In his Findings and Order on Remand, the judge made the following findings:

4. By late December 1993 the employee had essentially recovered from the effects of the cervical strain of September 1, 1993.

5. Although on September 1, 1993 the employee sustained a cervical strain arising out of and in the course and scope of his employment at no time subsequent to September 1, 1993 was the employee temporarily totally disabled as a result of this cervical strain.

In his memorandum, the compensation judge further explained as follows:

[A] preponderance of the evidence clearly establishes the employee was never temporarily totally disabled as a result of the cervical strain.

Although the medical records reflect the employee's complaints and reflect the fact that treatment was provided to the employee for these complaints, no medical evidence was introduced establishing or even tending to establish that the employee was unable to perform his employment duties as a result of the cervical strain. Rather any inability to work was as a result of conditions unrelated to the cervical spine strain. No physician has opined the employee was unable to work as a result of the cervical spine strain. In fact the employee's physician, Dr. Mark L. Young[,] agreed that the cervical condition had no effect on the employee's ability to work.

Contrary to the employee's arguments, substantial evidence easily supports the judge's conclusions on this issue. In addition to agreeing that the employee's neck condition had "no material effect on his ability to function or to work," Dr. Young indicated that the employee had not complained much about neck symptoms since late December of 1993 and that, but for the employee's cognitive impairment, the employee would "have been working all along." Dr. Brian Erickson, too, indicated that the employee was not employable "from a cognitive point of view," and Dr. Bruce Van Dyne, the employer's independent examiner, reported that the employee had had a good recovery from his cervical strain, with only "rather minimal and nonspecific . . . cervical symptoms," that the employee had no permanent impairment due to the strain, and that the employee did not require any specific restrictions with regard to his neck condition.

There is some evidence, as alleged by the employee, that indicates that the employee may continue to experience some symptoms possibly related to his cervical strain.³ Also, although Dr. Erickson focused primarily on the employee's cognitive deficits, he testified that the employee would not "be able to do anything competitive that would involve physical activity" due to his neck condition. However, the gist of the compensation judge's decision is that the employee's nonwork-related cognitive impairment was a superseding cause of the employee's disability for all relevant periods.⁴ The evidence amply supports this conclusion, and we therefore affirm the judge's decision that the employer is entitled to a credit, under Minn. Stat. § 176.179, against future benefit claims, if any, for temporary total disability benefits paid following the employee's September 1, 1993, work-related automobile accident.

³ Primarily headaches. However, there is some expert opinion indicating that the employee's headaches are not related to his neck condition.

⁴ That is, whether or not the employee continues to experience cervical symptoms, those symptoms are not a substantial contributing cause of the employee's inability to work. In this regard we would note that the compensation judge determined that "the employee had essentially recovered from the effects of the cervical strain" by late December 1993 (emphasis added); the judge made no express finding that the injury was only temporary.