RITA M. HAMANN, Employee/Appellant, v. ADVANCED CIRCUITS and TRAVELERS INS. CO., Employer-Insurer, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 12, 2000

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY - SUBSTANTIAL EVIDENCE. Where the employee testified that she can only work a limited number of hours without exacerbating her symptoms but where her treating physician released her to full-time work, and her pain clinic psychiatrist stated that she has chosen to work fewer hours, the compensation judge was supported by substantial evidence when he denied the employee's claim for temporary partial disability benefits. Under these circumstances the presumption that the employee's actual earnings equaled her earning capacity does not apply.

Affirmed.

Determined by: Wheeler, C.J., Wilson, J., and Rykken, J.
Compensation Judge: James R. Otto

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's denial of temporary partial disability benefits from January 26, 1999 through the date of hearing, October 29, 1999. We affirm.

BACKGROUND

The employee, Rita Hamann, was first hired by Advanced Circuits, the employer, in 1989. She initially worked in the drilling and routing department as a machine operator. Later, she worked as an electrical test operator, assisted inspectors and did silk screening. Her last position, and the one in which she was working at the time of her June 9, 1995 low back injury, was putting a soldering coating onto circuit boards. (T. 35-38.) At the time of her 1995 injury, the employee was 40 years of age. Her basic work schedule called for three twelve-hour days which generated a weekly wage of $554.11, based on an hourly rate of $15.22. (Judgment Roll: First Report of Injury.)

As a result of the July 9, 1995 injury, the employer and insurer admitted liability and paid workers' compensation benefits, including temporary total disability, temporary partial disability, rehabilitation and medical expense benefits.

The employee underwent a two-level spinal fusion on November 1, 1995, at spinal levels L4-5 and L5-S1. This surgery was not successful and on April 17, 1996, a facet fusion at L4-5 was conducted, again by Dr. John A. Dowdle, an orthopedic surgeon. As the result of a referral by Dr. Dowdle to Dr. David C. Randa, a neurologist, the employee was diagnosed with chronic pain syndrome and depression in September of 1996. She was referred to the Pilling Pain Clinic on September 10, 1996. At the time of her initial evaluation, Dr. Loran A. Pilling indicated that the employee was depressed and would benefit from a chronic pain program. The employee entered the Pilling Pain Clinic on September 16, 1996. (Ex. G.)

On October 9, 1996, Dr. Pilling issued a letter to Dr. Randa in which he provided the following history and diagnosis:

> Rita was later admitted to the pain clinic for treatment and has now participated in four weeks of therapy, which has consisted of stretching exercises, therapeutic pool exercises, relaxation therapy, and counseling in pain and stress management. I also doubled her Prozac up to 40 mg a day because, on admission, her psychological testing suggested mild to moderate depression. In addition, the testing showed a rather histrionic personality type with perfectionistic features. Rita admits to being a perfectionist who, in many ways, is her own worst enemy because of that characteristic.
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> During her stay here, I also talked with Dr. John Dowdle, her orthopedist. He, as you know, performed his most recent surgery on April 17, 1996. He told me that, at this time, she could return to gainful employment with restrictions of no lifting or carrying more than 20-25# occasionally, as well as the usual restrictions of occasional bending, twisting, etc. I, therefore, completed an R-33 based on those guidelines and provided it to her QRC today after our meeting.
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> The major finding during Rita's stay in the pain clinic is that she is very resistant to returning to work. She initially had told us that Dr. Dowdle said she couldn't go back to work for a year after her last surgery in April 1996. This was not consistent with what he told me by phone. My discussions with her and her QRC would be that we would find appropriate work for her and start her out at a work hardening schedule of four hours a day, three days a week, with no two days consecutively at work and then, from there, build up to her regular schedule. The QRC informs me that the employer is extremely flexible and will do everything possible to accommodate the patient.
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> * * *

> In my opinion, we need to find a suitable job situation and then need all of the professionals working with Rita to be consistent in their approach so that she realizes that what we are doing is appropriate. Her resistance to return to work may be a histrionic reaction or secondary gain; however, no matter which it is, consistency on our part will be very important.

(Ex. J.) The employee returned to work with the employer in a modified light-duty position, on a part-time basis, in late October 1996. The plan prescribed by Dr. Dowdle was for the employee to gradually increase the number of hours that she could work until she returned to a full-time schedule. While so employed, the employee's hourly rate was equivalent to that she had earned prior to her 1995 injury. As a result of lower wages resulting from part-time work, the employer and insurer paid temporary partial disability benefits to the employee.

In a follow-up letter dated December 19, 1996, to Dr. Dowdle, Dr. Pilling stated, "As we have discussed previously, it is my opinion that Rita is not highly motivated to return to work any sooner than necessary. For that reason, I suspect that there will be resistance to increased hours." (Id.)

The employee apparently continued to work at her light duty, part-time job during 1997. It is unclear how many hours the employee worked during the latter part of 1996 and during 1997.[1] On April 17, 1997, Dr. Dowdle issued a report in which he indicated that the employee had a 20% whole body permanent partial disability rating and had reached MMI. (Ex. B, 4/17/97 note.) This report was served on the employee on June 5, 1997. (T. 8.) The employer and insurer paid the permanent partial disability as IC.

On July 24, 1997, Dr. Dowdle indicated that the employee could work "3 days per week. Same restrictions x 2 weeks, then to add 1 hour per day each week until seen in 8 wks." (Ex. C.) On July 30, 1997, the employer made a formal job offer to the employee to continue performing in the position of "miscellaneous assembler," the position she had been working in since October of 1996. (Ex. 6.) This job offer contemplated that the employee would first start with a reduced number of hours and gradually build up to a full schedule sometime in the latter part of 1997. The work hardening plan had been prescribed by Dr. Dowdle and called for her to be working three days per week, five hours per day, as of August 11, 1997. Each week thereafter, the total number of hours worked would be increased by three, until she reached the 36 hours per week she had been working prior to her injury. (T. 50.)

The employee testified that she accepted the position offered on July 30, 1997. She stated that she was not required to do all of the tasks set forth in the job description attached to the job offer. She indicated that a great deal of the time she simply was required to sit without doing

[1] Dr. Dowdle's office notes indicate that the employee was working four hours per day three days per week in January 1997. On March 11, 1997, Dr. Dowdle noted that the employee was released to work three seven-hour days but was unable to handle this much. As a result, he changed her to two seven-hour days.

any work. The only work that she actually performed was that of the task called "serializing." She agreed that she was capable of doing all of the jobs set forth in the job description. She further indicated that as a result of pain associated with the work activities and the driving to work she was unable to increase her hours as set forth in Dr. Dowdle's plan. (Judgment Roll: Partial Stip. for Settlement of June 1998; T. 44-50.)

During the period from October 1996 through September 29, 1997, the employee received temporary partial disability benefits based on the hourly schedule outlined by Dr. Dowdle, whether the employee actually worked the number of hours required by that plan. (Judgment Roll: Partial Stip. for Settlement of June 1998, ¶ V.)

On August 29, 1997, the employee filed a claim petition seeking temporary partial disability benefits from May 5, 1997 to the present and continuing and that her 20% permanent partial disability rating, which had previously been paid as impairment compensation [IC], be paid as economic recovery compensation [ERC]. Apparently the employee was able to continue working at least some hours during each week until the end of 1997. She was then unable to work for the months of January and February 1998, but returned to work on March 1, 1998, and worked through March 8, 1998. (Table attached to June 1998 Partial Stip. for Settlement.) The employee did not work during the period March 10 through at least May 27, 1998. (June 1998 Partial Stip. for Settlement; T. 52-54.)

In a stipulation of partial settlement, which was signed by the employee on June 5, 1998 and approved by a compensation judge on June 11, 1998, the parties agreed that for the period of May 18, 1997 through March 10, 1998, the employee would be entitled to receive one-half of the temporary partial disability benefits calculated based on the actual number of hours the employee worked, instead of the amount previously paid based on an imputed work week. The employer and insurer agreed to pay temporary total disability benefits, as warranted, from and after March 10, 1998. The stipulation stated that the parties agreed that "the employee shall be deemed 'medically unable to continue' working within the meaning of the statute and case law. The employer and insurer shall serve and file a new MMI report at the appropriate time." (Id., at 4.) The parties agreed that Dr. Dowdle would remain as the primary treating physician of record and that a referral to Dr. Lutz was approved. This stipulation stated that, "The employee remained employed at Advanced Circuits. It is anticipated that Advanced Circuits will be able to make her another light duty job offer, at the appropriate time." (Id., ¶ VII.6, p. 4.) In addition, the parties agreed that the matter of whether the employee's permanent partial disability would be paid as ERC was deferred, with the employee reserving the right to raise the issue in the future. As a result of this stipulation, the employee's claim petition from August of 1997 was withdrawn and dismissed.

On June 19, 1998, the employer and insurer's attorney wrote a letter to the employee's attorney making a formal job offer to the employee of the miscellaneous assembler position which had previously been described and offered in the letter of June 30, 1997. (Ex. 7.) This letter, however, noted that while the employee had been released to return to full time work, the employer and insurer would restart the work hardening program as set forth in the earlier

opinion of Dr. Dowdle as contained in the 1997 job offer. (Id.) The employee accepted the offer and returned to work at the miscellaneous assembler position on July 12, 1998. (T. 55.) She testified that again she was given little or no work to do. She stated that essentially all she was required to do was punch in and punch out. She was not even given a daily job card, which was customarily filled out by all employees, because there was no work to be recorded. She did state, however, that on some occasions she was given serializing work. (T. 56-58.) The employee testified that she worked relatively few hours and only worked every other day. Sometime in the latter part of July or early August 1998, the employee was advised that she must start her work day at 8:00 a.m. Prior to that point, going back to October of 1996, the employee had been given flexibility on when she could start work. She testified that her most difficult time was early in the morning, when she was in the most pain. She stated that it was not always possible for her to arise early enough to move about and stretch and still arrive at work by 8:00. She testified that after she was put on a fixed starting time, she was repeatedly reprimanded for her tardiness, given a three-day suspension and threatened with termination. She stated that she did not want a termination on her record so she resigned on September 27, 1998. (T. 59-60.) During the eleven weeks prior to September 27, 1998, the employee earned $1,564.75, for an average of $142.25. During this period the employee earned as little as $33.90 and as much as $268.48 in one week. (Ex. O.)

The employee stated that following her resignation she attempted to look for work which would provide her with flexible hours and not require her to work on consecutive days. (T. 64.) As a result of this job search, made primarily through checking the want ads, the employee found work with Kuehn Roofing Company as a bookkeeper, which started on January 25, 1999. The employee testified that she works approximately fifteen hours per week doing payroll and accounts payable work at a computer. She stated that she does not have established hours and is simply required to have the required work done by the end of the week. She indicated that her workplace is approximately fifteen minutes from her home and she averages four to four-and-a-half hours per day, three days per week. She is paid $10.00 per hour and makes approximately $144.00 a week.

During early 1998, the employee was seen by Dr. David P. Kraker, an orthopedic specialist, for a second opinion concerning her condition. Dr. Kraker indicated that in his opinion the employee needed chronic pain treatment. (Ex. 2.) The employee was also seen by Peter A. Zelles, Ph.D., a clinical psychologist, in May 1998. Dr. Zelles indicated that the employee suffered from functional overlay, depression and exhibited symptom magnification. He indicated that histrionic traits were noted and that the employee needed chronic pain treatment. (Ex. 1.)

On September 3, 1998, the employee was referred to Dr. Pilling for a re-evaluation. In his report of September 3, 1998, Dr. Pilling made the following observations:

> When Rita was in the pain clinic she completed a battery of psychological tests, which is part of our routine admission process. The MMPI showed a conversion V with a highly elevated hysterical scale. This is a type of profile seen in people with significant functional overlay. She, throughout her stay in the program, showed

> many histrionic behaviors. I was firmly convinced that they played a significant role in her continued pain complaints. I was also convinced that secondary gain played a major role and that a return to work was not her goal. I stated that in my previous letters to other professionals.
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> In summary, the bottom line is that Rita is a very histrionic personality who has considerable functional overlay which accounts for much of her pain complaint. In addition, the secondary gain issues are quite significant. Rita told me that she doesn't want to work, and prefers to be at home. She gives pain as a reason for this, but I really believe that pain is a secondary issue. . . .
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> To summarize my evaluation, it is my professional opinion that Rita does not want to work. My second opinion is that the pain complaint is markedly exaggerated by functional overlay secondary to her histrionic personality and the secondary gain issues. I don't believe that being involved in a pain clinic would be of any benefit. I think the bottom line is that they should resolve the workers' compensation issue and get out of the legal system, which will make a big difference in Rita's response to pain.

(Ex. J.)

On November 16, 1998, the employee filed a new claim petition, requesting temporary partial disability from July 1, 1998, her permanent partial disability be paid as ERC and penalties. The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on October 29, 1999. In Findings and Order issued November 30, 1999, the compensation judge determined that the employee's permanent partial disability should be paid as IC and that her lower earnings following January 25, 1999 were a result of her personal preference and were not secondary to her personal injury of July 9, 1995. As a result, the compensation judge denied the employee's claim for ERC and for temporary partial disability following January 25, 1999. The employee appealed both the denial of ERC and temporary partial disability benefits.[2]

STANDARD OF REVIEW

[2] While the employee appealed the denial of economic recovery compensation for her 20% permanent partial disability, in her brief the employee waived the appeal of this issue.

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

The employee objects to the compensation judge's denial of her claim for temporary partial disability benefits after her return to work for Kuehn Roofing on January 25, 1999. She indicates that the compensation judge's reliance on Dr. Pilling's 1996 and 1998 reports is inappropriate, primarily because the employee had actually returned to work. She testified that her ability to work is significantly less than opined by Dr. Dowdle. She points out that her average weekly earnings at Kuehn Roofing ($144.12) were approximately the same as her average weekly wage during the eleven weeks she worked for the employer prior to September 27, 1998 ($142.25). The employee argues that she is entitled to a presumption that her actual earnings are equal to her earning capacity. She also points out that her move from the "make work" job at the employer to a job in which she feels useful and productive is entirely reasonable, especially since it is paying her approximately the same amount that she received when she last worked at Advanced Circuits.

The compensation judge made the following findings in resolution of the employee's claim for temporary partial disability following her return to work at Kuehn Roofing on January 25, 1999:

> 2. The preponderance of the credible evidence indicates that Ms. Hamann's wage loss from January 15, 1999 to date of hearing is due to Ms. Hamann's personal preference of not returning to a job of the same economic status with her date-of-injury employer, Advanced Circuits.
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> 4. There is no credible evidence of record that indicates that Ms. Hamann's subjective pain complaints prior to and after

> January 15, 1999 and to date of hearing are secondary to her personal injury of July 9, 1995.
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> 5. Ms. Hamann voluntarily terminated her employment at Advanced Circuits on September 18, 1998 most probably because of her reluctance to drive two hours to and from to work [sic] 2 to 4 hours a day, as well as her general reluctance to work, and her reluctance to work regular hours, and in addition, probably because of secondary gain issues.

In his memorandum, the compensation judge indicated as follows:

> This decision has been heavily influenced by the opinion of Dr. Loran Pilling who stated on September 3, 1998 that:
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> > "It is my professional opinion that Rita does not want to work. My second opinion is that the pain complaint is markedly exaggerated by functional overlay **secondary** to her histrionic personality and the secondary gain issues."
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> Ms. Hamann told Dr. Pilling that she doesn't want to work and prefers to be at home. It was Dr. Pilling's professional opinion that Ms. Hamann wants to be at home and doesn't want to work for secondary gain reasons and not necessarily because of any subjective pain.
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> Having accepted Dr. Loran Pilling's opinions as probably true, one cannot conclude, based upon a totality of the evidence, that Ms. Hamann is, under a reasonable interpretation of the law, entitled to two-thirds of the difference between her weekly or hourly wage at Kuehn Roofing Systems as a bookkeeper and her weekly or hourly wage at Advanced Circuits. At Kuehn Roofing Systems she earned $10.00 per hour and is allowed to work the number of hours per week that **she wants to work** and when she wants to work. The only requirement imposed on Ms. Hamann by Kuehn Roofing Systems is that the paychecks go out at the end of the payroll period. Her weekly wage at Advanced Circuits Systems was $16.18 per hour. She had regular hours of employment and a total commute time of two hours. Her wage loss since January 25, 1999, as an employee of Kuehn Roofing Systems, is due to the fact that she has voluntarily limited the number of hours per week that she works.

The issue before us on appeal is whether the compensation judge's factual determination that the cause of the employee's loss of earnings was her desire not to work is supported by substantial evidence in the record and is not clearly erroneous. The evidence presented by the employee on the issue consists of the employee's testimony that she has not limited the amount of time that she is able to work. She stated that she is currently working the maximum number of hours that she is physically capable of working. She indicated that her attempts to work more hours at Kuehn Roofing have caused her pain symptoms to increase and prevented her from continuing to work. Dr. Dowdle, however, has indicated that the employee is capable of working a 36-hour week, consisting of three twelve-hour days, based on her physiological condition. Dr. Pilling and Dr. Zelles indicate that the employee is suffering from functional overlay, depression and symptom magnification. Dr. Pilling worked with the employee in his pain clinic program from September 16, 1996 through sometime in November 1996 and had the opportunity to re-evaluate her on September 3, 1998. Based on his contact with her he came to the conclusion that the employee did not wish to work, but rather wished to stay at home. He also stated in his 1996 letter to Dr. Dowdle that he anticipated that the employee would have a difficult time increasing her hours per Dr. Dowdle's proposed work hardening schedule. The compensation judge was required to weigh the testimony of the employee against the opinions of several doctors in determining whether the employee was able to work any more than the limited number of hours she worked at Kuehn Roofing. It is the compensation judge's responsibility to weigh conflicting testimony and resolve any differences. In this case, the compensation judge felt that the greater weight of the evidence supported the conclusion that the employee had limited the amount of work she performed. As the compensation judge's factual finding is supported by substantial evidence in the record, the denial of temporary partial disability benefits is affirmed. Hengemuhle, 358 N.W.2d 54, 37 W.C.D. 235.