

ALLAN C. BRITTLE, Employee, v. PAKO GRAPHICS PRODS. and FIREMAN'S FUND INS. CO., Employer-Insurer/Appellants, and DOWNTOWN ORTHOPEDICS, P.A., MEDICA CHOICE FOR HEALTHCARE RECOVERIES, INC., and INST. FOR ATHLETIC MED., Interveners.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 27, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY BENEFITS. The compensation judge did not err in awarding the employee temporary benefits, despite a history of earnings exceeding his post-injury wage, where the record supported the conclusion that the employee's significant restrictions adversely affected his employability.

REHABILITATION. Substantial evidence supported the compensation judge's award of rehabilitation services where the employee's restrictions precluded the employee from performing his pre-injury job and adversely affected his ability to obtain jobs in his field.

Affirmed.

Determined by: Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Gary M. Hall

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's award of temporary total and temporary partial disability benefits and rehabilitation services. We affirm.

BACKGROUND

The employee was working as a mechanical engineer for Pako Graphic Products [the employer] on March 13, 1989, when he injured his low back while assisting three other people in lifting a machine weighing approximately 500 pounds.¹ He treated at the Park-Nicollet Medical Center for that condition and was diagnosed with a lumbar strain. In January of 1991, a CT scan indicated herniated discs at the L4-5 and L5-S1 levels. In October of 1991, the employee was referred to Dr. Robert Wengler, who diagnosed a symptomatic herniation of the L4-5 disc and performed a percutaneous laser discectomy in April of 1992. Dr. Wengler released the employee from his care in September of 1992.

¹ His annual salary in that job was approximately \$36,000.

The employee received no medical care for his back between September of 1992 and December of 1997. On December 2, 1997, he returned to Dr. Wengler, complaining of excruciating pain in the back down into the leg. An MRI showed an L4-5 disc herniation, and the employee underwent a microdiscectomy at the L4-5 level on December 8, 1997. Because of persisting problems, Dr. Wengler performed a repeat microdiscectomy on March 24, 1998. At the time of that surgery, Dr. Wengler discovered a recurrent herniation at L4-5.

In March of 1999, the employee had a sudden recurrence of back spasm with leg pain when sneezing. An MRI scan revealed a disc herniation at L5-S1, and the employee underwent another microdiscectomy, this time at L5-S1, on April 26, 1999. Dr. Wengler released the employee to return to work as of June 2, 1999.

The employee has had a number of jobs since his injury. After his initial surgery in 1991, the employee returned to work for the employer but was laid off in 1992. He then obtained a job at Automation Engineering Company, as a senior mechanical engineer. That company went bankrupt approximately one year later. The employee next worked at Check Technology for approximately a year and a half, again as a senior mechanical engineer. In 1996, he was offered a better job by Data Card Corporation and went to work for them as a principal mechanical engineer. At the time of his lay-off from Data Card in September of 1998, he was making \$69,000 a year.

In a partial stipulation for settlement filed on May 27, 1999, the employee contended that he had been unable to find work within his restrictions from September 11, 1998, through February 3, 1999, the date upon which the employee had reached 90 days post maximum medical improvement [MMI]. Pursuant to that stipulation, the employee was paid a compromised sum for the temporary total disability, together with additional permanent partial disability benefits to a close out of 21% of the whole body.

Following his fourth surgery and release to return to work in June of 1999, the employee was assigned a qualified rehabilitation consultant [QRC], Debra Bourgeois, to assist him in a return to work. Dr. Wengler, at that time, recommended a 25-pound lifting restriction and restrictions on bending, twisting, pushing, and pulling activities.

On September 3, 1999, the employee filed a claim petition seeking temporary total disability benefits continuing from April 26, 1999. In his job search, the employee focused on finding work as a mechanical engineer, and QRC Bourgeois recommended that the employee obtain software training (PRO-E) to enhance his employability. A rehabilitation request was filed on February 4, 2000, and the employer and insurer denied that request. On March 21, 2000, the employee accepted employment as a substitute teacher.

The claim petition and rehabilitation request were consolidated and proceeded to hearing on July 20, 2000. At the hearing, the employee was claiming, in part, entitlement to temporary total and temporary partial disability benefits and rehabilitation services in the form of additional job search assistance or PRO-E training. In findings and order filed on October 20,

2000, the compensation judge awarded temporary total and temporary partial disability benefits and rehabilitation services. The employer and insurer appeal.²

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

Temporary Total Disability Benefits

The employer and insurer contend that the employee is not entitled to temporary total disability benefits because there is no evidence that the 1989 injury, or the resulting disability, played any significant role in precluding the employee from returning to work as an engineer after June 2, 1999. We are not persuaded.

The employee has a 32% whole body impairment, and Dr. Wengler's most recent restrictions³ prohibit the employee from lifting more than ten pounds or engaging in activities that require repetitive bending, stooping, pushing, pulling, working in positions that cause postural stress, or prolonged sitting. Dr. Wengler also recommended that the employee be able to get up and move around on a repeated basis. Notice of MMI was not served on the employee until July 20, 2000, and there is apparently no dispute that the employee cooperated with rehabilitation services, specifically with job search efforts.

² The judge made additional findings from which the employer and insurer have not appealed: specifically, a finding that the April 1999 surgery was reasonable and necessary and causally related to the work injury, a finding that the employee was entitled to additional permanent partial disability for the herniation and surgery at the L5-S1 level, and a finding that service of notice of MMI was effective as of the date of hearing.

³ Given at the time of his deposition on July 18, 2000.

The testimony of QRC Bourgeois also supports the compensation judge's award. QRC Bourgeois testified that the majority of mechanical engineering jobs are fairly light duty but that some employers want "hands on engineers involved in making that machine, working in the production area." The employee was engaged in such a job at the time of his work injury but would now be excluded from such employment by virtue of his work-related restrictions.

The testimony of the employer and insurer's employment expert, Luanne Graham, further supports the compensation judge's findings. While Ms. Graham testified on direct examination that she did not think that the employee's physical restrictions were a significant contributing factor in the employee's inability to find work as a mechanical engineer, she also testified that she was unaware that Dr. Wengler had recently set the employee's lifting restrictions at ten pounds and that such a restriction would affect the employee's ability to find work in the engineering field.⁴

The facts of the instant case are clearly distinguishable from cases in which temporary total disability benefits were denied because the employee's work injury did not adversely effect his ability to work or find work. See Kautz v. Setterlin, 410 N.W.2d 843, 40 W.C.D. 206 (Minn.1987).

In the present case, the employee has severe restrictions that limit him to very light-duty work and that clearly preclude him from seeking a variety of jobs. While it is fortunate that the employee's education, experience, and interest lie in an area that typically does not require heavy labor, some engineering jobs require "hands on" work, and the employee would now be ineligible for such jobs. The employee's physical restrictions, due to his work injury, clearly impact his ability to find work. The compensation judge's award of temporary total disability benefits is affirmed.

Temporary Partial Disability Benefits

The employer and insurer contend that the compensation judge erred in awarding temporary partial disability benefits because the employee did not establish that his loss of earning capacity is causally related to the work injury. Again, we are not persuaded.

The evidence referenced in the section on temporary total disability provides substantial support for the conclusion that the employee sustained a loss of earning capacity related to his work injury. In addition, it is undisputed that the employee's work injury resulted in disability and that the employee is able to work subject to the disability. See Dorn v. A.J. Chromy

⁴ Ms. Graham also testified that she would be concerned if the employee had been sending out cover letters that indicate he has had a back injury. "I think potential employers when they see that kind of data, they have a tendency to - - If there are other applicants, they'll go to the other applicants first." This constitutes additional evidence that the compensation judge could have relied upon in determining that the employee's back injury was a substantial contributing factor in his inability to find work as a mechanical engineer.

Constr. Co., 245 N.W.2d 451, 29 W.C.D. 86 (Minn. 1976).⁵ The judge's decision on this issue is also affirmed.

Rehabilitation Services

The employer and insurer contend that the employee is not entitled to rehabilitation services because the employee is not a "qualified employee." A "qualified employee" is defined in Minn. R. 5220.0100 (22) as one who is "permanently precluded or likely to be permanently precluded from engaging in the employee's usual and customary occupation or from engaging in the job the individual held at the time of injury."

The job the employee held at the time of injury was one which obviously required some heavy lifting. The employee is currently unable to lift more than ten pounds. In addition, the employee was laid off by the employer in 1992, and the employer presented no evidence that work was available within the employee's current restrictions. The employee is precluded from engaging in the job he held at the time of injury and, therefore, is a qualified employee for purposes of rehabilitation services. As employer and insurer have raised no issue with regard to specific services, the compensation judge's award is affirmed.

⁵ An employee's actual earnings are generally presumed to be an accurate reflection of the ability to earn or earning capacity. Roberts v. Motor Cargo, Inc., 258 Minn. 425, 104 N.W.2d 546, 21 W.C.D. 314 (1960). While the presumption of earning capacity is rebuttable, the employer and insurer have made no argument, on appeal, that the presumption was rebutted.