

NEAL T. HOFIUS, Employee/Appellant, vs. UNITED HARDWARE DISTRIB. CO. and ST. PAUL FIRE & MARINE INS. CO., Employer-Insurer/Cross-Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 20, 2001

No. [REDACTED SSN]

HEADNOTES

TEMPORARY PARTIAL DISABILITY; EARNING CAPACITY. Substantial evidence, including the QRC's rehabilitation records and the treating physician's work slips, supports the compensation judge's finding that the employee was restricted to working 20 hours per week from September 27, 1999, and June 1, 2000, and therefore that the employee was entitled to temporary partial disability benefits during this time.

TEMPORARY TOTAL DISABILITY; CAUSATION. Substantial evidence, including expert medical evidence, supports the compensation judge's finding that the employee remained able to work 20 hours per week after June 2, 2000, and therefore was not entitled to temporary total disability benefits from that date through the date of the hearing.

Affirmed.

Determined by: Rykken, J., Pederson, J., and Johnson, J.
Compensation Judge: Gary P. Mesna

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's denial of temporary total disability benefits from June 2, 2000 through March 23, 2001. The employer and insurer cross-appeal the compensation judge's award of temporary partial disability benefits from September 27, 1999 through June 1, 2000. We affirm.

BACKGROUND

Neal Hofius, the employee, worked for United Hardware Distributing Company, the employer, between 1971 and 1990. During the course of his employment, he sustained four work-related injuries to his left knee and three injuries to his right knee. His first injury was on May 6, 1971, to his left knee, and his last injury on May 7, 1985 was to his left and right knees. At the time of his last injury, St. Paul Fire & Marine Insurance Company, the insurer, insured the employer for workers' compensation liability in the state of Minnesota. Born on January 9, 1945, the employee was 40 years old at the time of his 1985 injury.

As a consequence of the employee's injuries, he underwent numerous surgical procedures on both knees. He continued to work for the employer until it discontinued operations in Minnesota in 1990. Thereafter, the employer provided rehabilitation assistance to the employee and eventually he obtained employment with Telephone Specialists. The employee owned this company for a period of time with his wife, and worked full-time, earning \$7.00 per hour from its operation, but eventually sold the company in 1996 or 1997. At that point, the employee moved to the Aitkin, Minnesota, area. The employer and insurer again provided rehabilitation assistance to the employee. He began working at the Office Shop, in Brainerd, Minnesota, obtaining this position through a temporary employment service. Within three months, the employee became a direct employee of the Office Shop, initially waiting on customers, making deliveries and performing warehouse work. He eventually worked at lighter-duty tasks due to his increased symptoms in both legs. The employee earned a salary of \$800.00 per month, plus he received employee benefits of medical insurance coverage, vacation pay and sick leave. The employer also allowed him to use a company van for commuting to work from his home. Once the employee began working full-time for the Office Shop, rehabilitation assistance was discontinued and the rehabilitation plan was closed.

The employee continued to work full-time for the Office Shop. On May 14, 1999, the employee underwent a total right knee replacement surgery. Post-surgery, the employer and insurer provided additional rehabilitation assistance to the employee in the nature of medical management services. By September 1999, the employee was released to return to work by his treating physician, Dr. Patrick Kraft, for a part-time position, four hours per day, and the employee returned to work. The Office Shop was very accommodating to the employee's physical work restrictions, and provided part-time work for the employee, including office work such as purchasing and collection work. Because the employee was working only half-time, his wages were reduced to \$400.00 per month. The employee often worked less than four hours per day, but continued to be paid \$400.00 per month, and the employer continued providing the same employee benefits.

At the time the employee returned to work post-surgery on September 27, 1999, the QRC and insurer became aware that the employee was earning approximately \$4.61 per hour, compared to the \$8.00 per hour the insurer and QRC had previously believed the employee was earning.¹ As a result, the employer and insurer asked the QRC to continue providing rehabilitation assistance to assist the employee in locating more financially suitable employment.

¹ When the employee commenced working directly for the Office Shop he earned \$800/per month, which calculates to approximately \$4.61/hour based on full-time, 40-hour work weeks. There apparently was a misunderstanding between the parties as to the employee's actual hourly wage. When the employee worked for the Office Shop through the temporary employment agency he earned \$6.00 per hour. When he started working as a direct employee, he earned \$800 per month. The QRC's reports issued when the employee started his job at the Office Shop list an hourly wage of \$8.00. The employee testified that he never advised the QRC that he would be earning \$8.00 per hour. He testified that "she might have taken the eight hundred a month [to mean] \$8.00 an hour . . ." (T. 37, 42.)

Although the employer and insurer had paid temporary partial disability benefits to the employee for many years, in September 1999 a dispute arose concerning the accuracy of the payments being made by the insurer. The employee contested the accuracy of those payments, and ceased cashing his ongoing temporary partial disability checks, returning them to his attorney, who then returned them to counsel for the employer and insurer.

The employee discontinued working in June 2000, based on Dr. Kraft's restrictions. On June 2, 2000, the employee reported to Dr. Kraft that standing and walking caused him no discomfort, but that he noticed knee pain when sitting or arising from a sitting position. Dr. Kraft restricted the employee from work, stating that "I think that perhaps rest or pulling him off of work and seeing that if the decreased activities would help this to some degree . . . I suggest that we follow up with him in about a month so we could re-evaluate this pain and see if it is changing in terms of its severity or quality." (Ee. Ex. D.)

The record contains only one additional medical report from Dr. Kraft from a consultation on September 8, 2000. On that date, Dr. Kraft continued to restrict the employee entirely from work. Dr. Kraft's chart note states that "I would anticipate following up with him in three or four weeks." However, the employee did not follow-up with Dr. Kraft after his examination on September 8, 2000. The employee testified that his pain in both knees persists, especially when he walks or stands, and at night. (T. 30.) He walks each day, at Dr. Kraft's recommendation, but does not perform any physical labor.

On April 12, 2000, the employee filed a claim petition, alleging entitlement to an underpayment of temporary partial disability benefits continuing from October 9, 1999, based upon his actual earnings generated while working for the Office Shop. The employee later amended his claim to include a claim for temporary total disability benefits from June 2, 2000, to the present and continuing. The employer and insurer denied liability for the claimed benefits.

On September 13, 2000, Dr. Jack Bert conducted a medical evaluation of the employee at the request of the employer and insurer. Dr. Bert concluded that the employee's disability and need for medical treatment following his 1985 injury were not causally related to that injury, but instead dated back to his original injuries in the early and mid 1970s. Dr. Bert concluded that although the medical treatment the employee had received was reasonable and necessary, the total right knee arthroplasty that the employee underwent in May 1999 was unrelated to the employee's 1985 injury. Concerning the employee's ability to work, Dr. Bert concluded that the employee is employable. He restricted the employee to a 50-pound weight limit and avoidance of repetitive bending and stooping, climbing, kneeling and crawling activities. (Er. Ex. 1.)

The matter was heard before a compensation judge on March 23, 2001. In Findings and Order served and filed April 5, 2001, the compensation judge found that the employee was entitled to temporary partial disability benefits between September 27, 1999 and June 2, 2000, based upon his actual earnings from the Office Shop. The compensation judge denied the employee's claim for temporary total disability benefits since June 2, 2000, finding that the employee was physically capable of working within physical work restrictions during that period

of time. The employee appeals from the denial of temporary total disability benefits. The employer and insurer cross-appeal from the award of temporary partial disability benefits. We affirm.

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 Partial Disability

From September 27, 1999 through June 1, 2000, the employee worked on a half-time basis, earning \$400.00 per month. The compensation judge found that the employee was partially disabled with restrictions directly related to his injury, and that his reduced earning capacity was directly related to his work injuries. The compensation judge concluded that the employer and insurer did not overcome the presumption that the employee's actual earnings represented his true earning capacity, and therefore that the employee was entitled to payment of temporary partial disability benefits based on his actual earnings. The issue before this court, therefore, is whether the compensation judge's conclusions are supported by substantial evidence and are not clearly erroneous.

In order to demonstrate entitlement to temporary partial disability benefits, an employee must demonstrate a work-related physical disability and an actual loss of earning capacity that is causally related to the disability. Krotzer v. Browning-Ferris, 459 N.W.2d 509, 43 W.C.D. 254 (Minn. 1990); Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976); see also Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 864, 41 W.C.D. 42, 48 (Minn. 1988). An employee's entitlement to temporary partial disability benefits is based on the difference between the employee's wage on the date of injury and the wage the employee is able to earn in his or her partially disabled condition. Minn. Stat. § 176.101, subd. 2. "[T]emporary partial benefit awards are generally based on post-injury wages because post-injury wages are presumptively representative of an employee's reduced earning capacity. In appropriate

circumstances, however, this presumption can be rebutted with evidence indicating that employee's ability to earn is different than the post-injury wage." Einberger v. 3M Co., 41 W.C.D. 727, 739 (W.C.C.A. 1989) (citation omitted); see also, Klein v. Empire Rebar, Inc., slip op. at 6 (W.C.C.A. Jan. 6, 1993). "Determinations of earning capacity are factual in nature." Einberger v. 3M Co., 41 W.C.D. at 737. Thus, it is up to the compensation judge to determine the employee's earning capacity. Noll v. Ceco Corp., 42 W.C.D. 553, 557 (W.C.C.A. 1989).

The compensation judge concluded that the employer and insurer had not overcome the presumption that the employee's actual earnings represented his true earning capacity, and therefore concluded that his temporary partial disability benefits are to be calculated based on those actual earnings. In his memorandum, the compensation judge referred to the medical evidence supporting his conclusion that the employee was restricted to working 20 hours per week by Dr. Kraft between September 27, 1999 and June 1, 2000. The compensation judge noted that it is not clear from Dr. Kraft's records what the employee's condition was during that period of time or what his restrictions were. The compensation judge specifically noted that except for one work slip dated November 26, 1999, there are no records or reports in the evidentiary record from Dr. Kraft between March 26, 1999, and March 17, 2000. However, the compensation judge noted that there are references in the QRC's rehabilitation records and in Dr. Kraft's work slips, dated November 26, 1999 and March 17, 2000, that indicate the employee was limited to working four hours per day during this time period. The compensation judge concluded that it was "abundantly clear" that the employee was limited to working part-time during this period.

The employer and insurer argue that the employee was earning less than minimum wage, \$4.61 per hour, while working part-time, that he was capable of earning a higher hourly wage by working for a different employer, and that he did not cooperate with rehabilitation or make a diligent effort to find other higher-paying work. The compensation judge rejected these arguments, citing to the combination of the employee's weekly wages, plus his fringe benefits of health insurance, vacation and sick leave, and the use of a vehicle for commuting. The compensation judge also concluded that the employee "generally cooperated with rehabilitation." (Memo. p. 4.) Rehabilitation records, and the employee's testimony, document that the employee did not follow up on some of the job leads provided by the QRC. However, the compensation judge found that the employee had a reasonable basis for this lack of follow-up, including that he was already working four hours per day as allowed by his treating physician, that most of the jobs identified by the QRC were full-time, and that the employee knew that one of the potential employers suggested by the QRC was experiencing financial difficulties such that he was not willing to switch to that place of employment.

Substantial evidence of record, including the employee's testimony, the QRC's records, reports and testimony, and the employee's medical records, support the compensation judge's conclusion that the employee was temporarily partially disabled from employment from September 27, 1999 through June 1, 2000. A determination of earning capacity is factual in nature, Einberger, 41 W.C.D. at 737, and as substantial evidence of record adequately supports the compensation judge's conclusion concerning the employee's earning capacity, and as that conclusion is not clearly erroneous, we affirm.

Temporary Total Disability

The compensation judge found that since June 2, 2000, the employee has remained able to work at least four hours per day, and denied his claim for temporary total disability benefits. The employee claims entitlement to temporary total disability benefits since June 2, 2000, as Dr. Kraft entirely restricted the employee from work due to the employee's increasing complaints of pain. The employee appeals from this denial of benefits; we affirm.

Temporary total disability is found when the employee's physical condition, together with his training, experience, and type of work available in his community cause the employee to be unable to obtain anything but sporadic employment at an insubstantial wage. Fredenburg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 260 (Minn. 1981). The compensation judge found that the employee was not entitled to temporary total disability benefits for this period of time, as the employee remained able to work at least four hours per day. In his memorandum, the compensation judge identifies his various bases for concluding that the employee was not totally unable to perform any work since June 2, 2000.

Dr. Kraft took the employee off work as of June 2, 2000 because of increasing complaints of pain. While ordinarily the Court would give great deference to the treating doctor with respect to such matters, in this case there are a number of reasons why the Court has concluded that the employee was not totally unable to perform any work from June 2, 2000 through the date of hearing. First, Dr. Kraft could find no physical basis for the complaints of extreme pain. He had no swelling or erythema. He had good strength, excellent range of motion, and normal sensation. X-rays were unremarkable. Second, his condition had changed little by the time he saw Dr. Bert on September 13, 2000, and Dr. Bert felt that he was capable of working. Finally, he did not follow up with Dr. Kraft after the visit of September 8, 2000 or pursue the referral to the Mayo Clinic. In fact, he did not get any medical care for his knee for over six months prior to the hearing on March 23, 2001. From these facts, the Court concludes that while he may be having continuing pain in his knees, from a physical standpoint, he is still capable of performing the light-duty work at the Office Shop, at least on a part-time basis.²

The compensation judge also relies upon the employer and insurer's independent medical examiner, Dr. Jack Bert, who examined the employee on September 13, 2000, and felt that the employee was capable of working. Based upon that medical evidence, the compensation judge concluded that the employee was still capable of performing the light-duty work at the Office Shop which he had performed between September 27, 1999, and June 1, 2000. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings

² The employee testified that he "never saw" the referral made by Dr. Kraft to the Mayo Clinic, (5. 51) that is included in Dr. Kraft's report dated September 8, 2000.

of the compensation judge are to be upheld. We note that it is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

After reviewing the record as a whole, we conclude that the compensation judge's determination that the employee was able to work on a part-time basis since June 2, 2000, is adequately supported by the record, including medical records and witness testimony, and is not clearly erroneous. We therefore affirm.