MIKE MAYER, Employee/Appellant, v. HORMEL FOODS CORP., SELF-INSURED/COMPCOST, INC., Employer/Cross-Appellant, and MAYO FOUND., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 18, 2001

No. [REDACTED SSN]

HEADNOTES

EARNING CAPACITY. Pursuant to Jasnoch v. Schwab Co., 495 N.W.2d 204, 48 W.C.D. 139 (Minn. 1993), the compensation judge properly ordered the employer to pay temporary partial disability benefits, based on the employee's actual earnings, for weeks in which the employee took some vacation days, despite the fact that the employee received the same pay for vacation as he would have had he not been injured.

EARNING CAPACITY; TERMINATION OF EMPLOYMENT - VOLUNTARY TERMINATION. While substantial evidence supported the compensation judge's decision that the employee voluntarily left his job at the employer to take lower-paying work for reasons unrelated to his disability, the matter was remanded for relitigation in light of other considerations relevant to the employee's temporary partial disability benefit claim.

Affirmed in part, reversed in part, and remanded.

Determined by Wilson, J., Wheeler, C.J., and Pederson, J.
Compensation Judge: Ronald E. Erickson

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's denial of temporary partial disability benefits following the employee's termination from the employer to take a new job. The self-insured employer cross appeals from the judge's award of temporary partial disability benefits based on vacation pay during the employee's employment with the employer. We affirm in part, reverse in part, and remand.

BACKGROUND

The employee began working for Hormel Foods Corporation [the employer] in its Austin, Minnesota, plant in January of 1986, performing various production line jobs, some of which required repetitive over-the-shoulder lifting and reaching. As a result of these work activities, the employee sustained a right shoulder injury effective April 23, 1996, and a left shoulder injury effective March 21, 1997. The self-insured employer admitted liability for the injuries and paid various benefits, including treatment expenses. The employee's weekly wage at the time of the second work injury was $643.34, which included overtime pay.

On March 27, 1997, the employee underwent right shoulder surgery, performed by Dr. Paul Matson, consisting of a right shoulder arthroscopic subacromial decompression with coracoacromial ligament resection, anterior acromioplasty, and inferior surface distal clavicle resection. He returned to work with restrictions in about May of 1997 but continued to see Dr. Matson for ongoing symptoms. When his condition did not improve as he had hoped, the employee sought treatment at the Mayo Clinic, where he came under the care of Dr. Shawn O'Driscoll. Further conservative treatment proved ineffective, and the employee underwent a second right shoulder procedure on February 5, 1998, performed by Dr. O'Driscoll.

Following his second surgery, the employee was released again to return to the employer, subject to certain restrictions, including no repetitive work with his right arm, no overhead work, and no lifting of more than five pounds. His symptoms apparently improved as time went on; a treatment note dated June 2, 1998, indicates that the employee was "doing very well," with only "occasional pain," and that he had full range of motion as well as full strength. The employee was by that time working full eight-hour days, forty hours per week, and was advised to "continue his current work schedule with no limitations."

By the fall of 1998, the employee had begun to experience increased left shoulder symptoms, and he ultimately underwent left shoulder surgery on February 10, 1999, in the nature of an arthroscopic acromioplasty and distal clavicle resection. About six weeks later, on March 24, 1999, the employee was seen by Dr. David Haaland, another Mayo physician, for a "[f]inal impairment rating for injury to right shoulder."

Dr. Haaland noted that the employee had essentially full range of right shoulder motion and that, while the employee's left shoulder was still "in the recovery phase," the employee could passively elevate it and move it almost through a full range of motion. The doctor found the employee at maximum medical improvement, rated the employee's permanent right shoulder impairment at 6%, pursuant to Minn. R. 5223.0450, subp. 3A(2), and recommended the following restrictions:

> He should not lift anything over 15 pounds above shoulder height with his right shoulder at the present time. He can do that on an occasional basis. He can lift objects up to 30 pounds between waist height and shoulder height on an occasional basis. He can work 40 hours per week. There is no work preclusion to standing, walking, bending, or stooping. He can do repetitive grasping and releasing as long as it is done between waist height and shoulder height.

Two months later, in May of 1999, Dr. Regina McGovern indicated that the employee had essentially normal range of motion but that he was complaining of some anterior shoulder pain, particularly with overhead activities. The doctor indicated that the employee was "doing very well" but that he should continue to observe restrictions at work consisting of no overhead activities and no heavy lifting.

The employee performed several different line jobs at the employer following his third surgery, all of which qualified as light work. The employee testified that he was unable to keep pace with a job placing absorbent pads on bacon and was therefore transferred to a line job straightening cooked bacon strips. Both jobs were repetitive, and the employee complained to the employer's manager of plant personnel, Timothy Fritz, and the employer's personnel coordinator, Donna Larsen, that the work was aggravating his symptoms. However, neither job required lifting or reaching at or above shoulder level. Ms. Larson testified that the employee also raised personal issues in some of his meetings with her, and both Ms. Larson and Mr. Fritz indicated that the employee sought advice as to whether he should leave his job with the employer.

In mid June 1999, the employee returned to Dr. O'Driscoll, complaining of right shoulder pain. Dr. O'Driscoll found full range of motion and normal strength, but he agreed "with Dr. Haaland's note of March 24, 1999 and the recommendation . . . that [the employee] should be limited," noting, "It is the repetitive motions that are going to be a problem for him." The doctor also suggested that the employee "should have a closure to this issue regarding his work." A return to work form dated June 15, 1999, the date of Dr. O'Driscoll's examination, indicates that the employee was to be restricted as follows: "Lifting restrictions: No more than 15 [lbs.] overhead - rarely. May lift 30 [lbs.] between waist [and] shoulders occasionally. Should work only 40 hours/week, and repetitive work between waist [and] shoulder level as tolerated."

During the summer of 1999, the employee bid for two or three other jobs in the employer's plant, but he did not secure any of the positions, either because of lack of seniority or because he did not pass the requisite tests. As a result, he continued in his job straightening bacon strips. Both Ms. Larson and Mr. Fritz indicated that the employer had a number of nonrepetitive jobs and that the employer had to go outside the plant to fill some of those positions. Specifically, forklift driving jobs were available during the period in question, but the employee did not apply for them.

The employee saw Dr. O'Driscoll again in late September of 1999. In his office notes of September 28, 1999, Dr. O'Driscoll reported that the employee's left shoulder was "fine," with no pain at all, but that his right shoulder still hurt somewhat. Examination revealed full range of motion, negative impingement sign, normal strength, and no atrophy. Speculating that the employee's pain was coming from his neck, Dr. O'Driscoll agreed with the employee's request to see a chiropractor. Dr. O'Driscoll also noted that the employee was "still working at [the employer] doing repetitive action" and was "wondering about changing his line of work to the health care areas. He has an opportunity for health care maintenance." Also in late September of 1999, the employee met with Mr. Fritz and told him he had been offered a maintenance job with another employer, asking if he could have time off to try that job. Mr. Fritz denied the request, explaining that vacation leave was governed by the labor contract.

On October 5, 1999, the employee resigned from his job with the employer to take the maintenance job at a nursing home located in Adams, Minnesota, which was closer to his home in Stacyville, Iowa. The maintenance job paid $10.00 an hour to start, with a raise to $10.80 after six months, for a forty-hour work week.

The matter came on for hearing before a compensation judge on August 8, 2000, for resolution of two primary issues: the employee's entitlement to temporary partial disability benefits on paid vacation days while employed by the employer, and the employee's entitlement to temporary partial disability benefits following his termination from the employer to take the maintenance job. With respect to the claim regarding vacation pay, the employer asserted that no temporary partial disability benefits were payable because the employee's vacation pay was unaffected by his work injuries. As for the employee's claim for benefits following his termination from the employer, the primary dispute between the parties was whether the employee had been physically able to perform his work with the employer.

In a decision issued on October 6, 2000, the compensation judge determined that the employee was entitled to temporary partial disability benefits during the periods in which he received vacation pay from the employer. However, concluding that the employee had voluntarily quit his job with the employer for reasons unrelated to his disability, the judge denied the employee's claim for temporary partial disability benefits based upon his earnings in his maintenance job. Both parties appeal.

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

Voluntary Termination

In his findings and order, the compensation judge concluded that the employee was "fully able to do the job as offered and provided to him by [the employer] in October of 1999" and that there was "no medical proof of record in any way indicating that the employee was physically unable to perform the work." Based on his finding that the employee voluntarily quit this job, the judge denied the employee's claim for temporary partial disability benefits based on his lower earnings from the nursing home maintenance work. On appeal, the employee contends that substantial evidence does not support the judge's conclusion that the employee was fully able to do the repetitive line work required by his job with the employer, and, in support of his contention,

he cites various alleged factual "errors" contained in the judge's findings. After review of the record as a whole, we cannot conclude that the judge erred in determining that the employee was physically able to perform his job with the employer and that he quit that job for reasons unrelated to his work injury.

The alleged factual errors cited by the employee are either minor or not actually erroneous. For example, it may be true, as the employee points out, that the employee's new maintenance job was not actually in the employee's "home town," contrary to the judge's findings. However, that maintenance job, in Adams, Minnesota, was nevertheless ten miles closer to the employee's home in Stacyville, Iowa, than was the employee's job with the employer in Austin. Similarly, while the compensation judge was mistaken in attributing the March 24, 1999, treatment notes to Dr. O'Driscoll, those notes and findings were prepared by another Mayo physician, and in his June 1999 notes, Dr. O'Driscoll expressed agreement with that physician's recommendations. More importantly, the errors complained of do not reasonably call into question the judge's ultimate finding as to the employee's ability to perform his job with the employer.

Dr. O'Driscoll, the employee's treating physician, wrote in June of 1999 that the employee could perform repetitive work between waist and shoulder level "as tolerated." Although the employee evidently discussed his job with Dr. O'Driscoll, neither Dr. O'Driscoll nor any other physician ever specifically reported that the employee was physically or medically unable to perform his line job at the employer because of his work-related shoulder injuries. And, as the compensation judge noted, the employee's shoulder examination results through the summer and into the fall of 1999 were nearly normal. The judge could have concluded, based on the employee's testimony, that the employee could not "tolerate" the work at the employer, as specified by Dr. O'Driscoll's restrictions; however, the judge was certainly not required to do so. By rejecting the employee's claim to this effect, the judge was in essence making a credibility determination, which was his unique function as factfinder. See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 41 W.C.D. 79 (Minn. 1988). As the judge also noted, the employee made very little effort to find nonrepetitive work with the employer, which was arguably available, and the employer had always accommodated the employee in the past. Under these circumstances, the record reasonably supports the judge's conclusion that the employee voluntarily left his job with the employer to take a lower-paying job located closer to his home. However, that conclusion does not end the analysis.

An employee is temporarily and partially disabled if the employee has a physical disability, is able to work subject to that disability, and has an actual loss of earning capacity causally related to the disability. Dorn v. A.J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976); Morehouse v. Geo. A. Hormel & Co., 313 N.W.2d 8, 34 W.C.D. 314 (Minn. 1981). As a general rule, post-injury wages create a rebuttable presumption of earning capacity. See Mitchell v. White Castle Sys., Inc., 290 N.W.2d 753, 32 W.C.D. 288 (Minn. 1980). In the present case, the employee has a disability, resulting in restrictions that preclude him from performing his preinjury job, and, because of his injury-related restrictions on hours, he was receiving temporary partial disability benefits even while working for the employer. Moreover, "[v]oluntary termination . . . [does] not preclude a claim for benefits upon proof of wage loss attributable to the disability," Fielding v. Geo. A. Hormel & Co., 439 N.W.2d 12, 15, 41 W.C.D.

942, 945 (Minn. 1989),[1] and an employee's wage in a post-injury job has little evidentiary value for purposes of determining earning capacity if the job is no longer available. See, e.g., Larson v. Gorman Foundry, 60 W.C.D. 257 (W.C.C.A. 2000); Millerbernd v. Spectrol. Inc., 47 W.C.D. 479 (W.C.C.A. 1992).

The present case was litigated, decided by the compensation judge, and briefed on appeal as if the reason for the employee's termination, standing alone, dictated the result. As indicated above, there are other considerations relevant to evaluating the employee's temporary partial disability claim. Therefore, we remand the matter to the compensation judge for further proceedings. See Fielding, 439 N.W.2d 12, 15, 41 W.C.D. 942, 945 (remand for relitigation appropriate where issue was not properly framed and argued to the compensation judge). On remand, the parties may present additional evidence to the judge bearing on the employee's earning capacity and entitlement to temporary partial disability benefits, including evidence as to whether higher-paying physically appropriate work with the employer, or other employers, was reasonably available following the employee's termination. If specific higher-paying work was available during the period in question, the judge should consider whether temporary partial disability benefits should nevertheless be awarded based on an imputed earning capacity. See, e.g., Boyd v. Sunrise Painting and Wallcovering, No. [REDACTED SSN] (W.C.C.A. Apr. 3, 1998); Herrly v. Walser Buick, Inc., 46 W.C.D. 530 (W.C.C.A. 1992). Either party may of course appeal from the judge's decision.

Vacation Pay

The employee took several vacation days in May and July of 1999, less than a week of vacation at a time. Under the employer's labor contract, workers receive vacation pay without reference to overtime; that is, employees are paid a given rate per day of vacation taken. In contrast, the employee's weekly wage on the date of injury included overtime pay. The employer in this case did not pay the employee temporary partial disability benefits for those days for which he received vacation pay, reasoning that the employee received precisely the same pay for vacation as he would have received had he not been injured. The employee claimed an underpayment, and the compensation judge agreed, ordering the employer to pay temporary partial disability benefits based on the difference between the employee's weekly wage and the employee's actual earnings for those weeks in which the employee received vacation pay. The employer appeals, arguing that the compensation judge's decision allows the employee to receive more, due to the combination of vacation pay and temporary partial disability benefits, than the employee would have received in his pre-injury employment. As the employer puts it, the employee has no wage loss, relative to vacation pay, causally related to his disability. While we understand the employer's position, we agree with the judge's ruling on this issue.

In Jasnoch v. Schwab Co., 495 N.W.2d 204, 48 W.C.D. 139 (Minn. 1993), the Minnesota Supreme Court held that suspension of temporary partial disability benefits was not

[1] Citing Johnson v. State, Dep't of Veterans Affairs, 400 N.W.2d 729; 39 W.C.D. 367 (Minn. 1987); Kurowski v. Kittson's Memorial Hosp., 396 N.W.2d 827, 39 W.C.D. 169 (Minn. 1986); and Marsolek v. Geo. A. Hormel & Co., 438 N.W.2d 922, 41 W.C.D. 964 (Minn. 1989).

warranted during brief periods in which a teacher's aide did not work because school was closed for winter recess and holidays. "Since there [was] no dispute that [the employee] ha[d] steady employment and an established earning capacity, the compensation judge properly denied the petition to suspend temporary partial benefits." Id., at 205, 48 W.C.D. at 141. To hold otherwise, the court reasoned, "would only serve to frustrate the legislature's effort to reduce litigation of workers' compensation claims." Id., at 205-06, 48 W.C.D. at 141. Subsequently, this court applied Jasnoch to other instances of isolated absences from work. See Hill v. Mackay Envelope, No. [REDACTED SSN] (W.C.C.A. July 10, 1998); Fox v. Minn. Mining & Mfg. Co., No. [REDACTED SSN] (W.C.C.A. Feb. 20, 1998). The Jasnoch rationale also applies in the present case--again, to adopt the employer's position would only encourage litigation. We would also note that temporary partial disability benefits are typically calculated and paid on a weekly basis, see generally Erdich v. Ford Motor Co., No. [REDACTED SSN] (W.C.C.A. Aug. 20, 1993), and the employer's theory would require deviation from this general rule.[2]

We are not called upon to decide what the result might have been had the employee taken an extended vacation of several weeks or more; we hold only that the judge did not err in concluding that the employee was entitled to benefits, based on his actual pay, during weeks in which he took some paid vacation days. We therefore affirm the judge's decision on this issue.

[2] Here, the employee took full days off, but another employee might take only an hour, or several hours, of paid vacation on a given day. The employer's rationale would apply equally to any increment of vacation an employee could take.