RICHARD PATCH, Employee/Appellant, v. ARKAY CONSTR. CO. and TRANSP./CNA INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 14, 2001

No. [REDACTED SSN]

HEADNOTES

PERMANENT TOTAL DISABILITY - SUBSTANTIAL EVIDENCE; WITHDRAWAL FROM THE LABOR MARKET - RETIREMENT; TEMPORARY TOTAL DISABILITY - SUBSTANTIAL EVIDENCE. Substantial evidence, including expert vocational opinion, supported the compensation judge's denial of temporary total and/or permanent total disability benefits, especially where the record reasonably supported the conclusion that the employee was not medically able to continue working, that he left his job to take his union pension of $36,000 a year, and that he did not look for other work because he did not want to jeopardize his pension payments.

WAGES - IRREGULAR. The judge did not err in using the 26-week averaging formula to determine the employee's weekly wage where wage records supported the conclusion that the employee's wages were irregular.

Affirmed in part and vacated in part.

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

OPINION

DEBRA A. WILSON, Judge

The employee appeals from the compensation judge's decision as to weekly wage and from the judge's denial of temporary total and/or permanent total disability benefits following the employee's termination from the employer in May of 1999. We affirm in part and vacate in part.

BACKGROUND

The employee was born in 1942 and left school after the ninth grade. His early employment history includes work as a farm hand and as a mechanic. In about 1965, the employee became a construction laborer, working in that field for the next 35 years. Sometime in the early 1970s, he obtained a job as a laborer for Arkay Construction Company [the employer], a commercial remodeler. The employee's job duties for the employer included loading, hauling, and unloading materials such as scaffolding and planking.

On October 21, 1996, the employee fell from the bed of a truck at work, landing on the pavement on his right shoulder and head. He apparently lost consciousness for a brief period and was taken by ambulance to the emergency room of a local hospital, where he was examined and released. He was then apparently off work for a short period before returning to a light-duty job. However, not long after that, on about November 11, 1996, the employee went off work again because of symptoms in his neck and right shoulder.

The employee remained off work entirely for the next five months, with diagnoses ranging from a possible rotator cuff tear and/or cervical radiculopathy to traumatic bursitis and chronic right trapezial strain. An eventual MRI scan of the employee's shoulder was normal, but a cervical MRI scan disclosed degenerative changes at C3-4 and C6-7, without neural impingement or herniations. Treatment for the employee's symptoms included medication, physical therapy, and cortisone injections. In March of 1997, the employee began receiving rehabilitation assistance to facilitate a return to employment.

The employee returned to light-duty employment with the employer in April of 1997 and worked at least intermittently, receiving temporary total and/or temporary partial disability benefits, through February 8, 1998, when he returned to work, at full wage, following the completion of formal work hardening. The discharge summary from the employee's work hardening program, dated February 6, 1998, indicates that the employee had demonstrated the ability to perform all critical aspects of his usual pre-injury laborer/truck driver job. In a report of that same date, Dr. Frank Wei, one of the employee's treating physicians, indicated that the employee had reached maximum medical improvement [MMI], with 0% permanent partial disability, from his chronic right shoulder and neck pain.

The employee continued to work for the employer for more than a year. He testified that, while his job was classified as light duty, it required repetitive use of his right arm and aggravated his right shoulder symptoms. Activities performed by the employee during this period included sweeping and shoveling construction debris and using a "scraper" to scrape hardened cement and other substances from floors at construction sites.

In July of 1998, Dr. Wei began to recommend increasingly strict limitations on the employee's work activities in an attempt to address the employee's continuing shoulder symptoms. By August of 1998, Dr. Wei had noted that it had been difficult to "get [the employee's] shoulder better" because he continued to use it beyond his restrictions, and, in September of 1998, Dr. Wei suggested that the employee consider additional job modifications "or job search." In that same report, Dr. Wei noted that the employee was thinking of retiring the following June and that, if the employee had "persistent problems or feels that [his shoulder] bothers him too much then he will need to go into job search activities or look for a different type of employment." The following spring, in an April 29, 1999, response to a letter from the employee's attorney, Dr. Wei wrote, "[f]rom your letter, it appears that if [the employee] is having increasing problems with his shoulder, that he is not capable of this continued line of work."

The employee resigned from his job with the employer in late May of 1999 and began receiving $3,000 a month under his union pension plan. When resigning, the employee did not inform the employer that he was leaving his job because of any symptoms related to his work

injury. He later obtained part-time seasonal work, through a friend, for the City of Lonsdale, mowing weeds using a tractor. He earned $1,700 in 1999 and $4,600 in 2000 performing this work. The employee may not work as a construction laborer and remain eligible for his pension.

In July of 2000, the employee underwent surgery on his right knee. There is no current claim that his right knee condition is causally related to his work activities with the employer.

The matter came on for hearing before a compensation judge on January 18, 2001, for consideration of the employee's claim for permanent total or temporary total disability benefits following his termination from the employer in May of 1999. The employer and insurer raised numerous defenses, contending in part that the employee had voluntarily left his job for reasons unrelated to his disability; that he had not conducted a reasonably diligent job search; that he was beyond 90-days post MMI; and that he had retired from the labor market. Other issues included the nature of the work injury, the employee's weekly wage on the date of injury, and whether the employee had satisfied the permanent partial disability threshold applicable to permanent total disability claims under Minn. Stat. § 176.101, subd. 5. Evidence included the employee's medical and rehabilitation records; a report from Jane Moncharsh, the employer and insurer's vocational expert; the report and testimony of Larry Mansfield, the employee's vocational expert; and reports from the employer's independent medical experts, Drs. David Boxall and Sean Flood.

In a decision issued on February 22, 2001, the compensation judge made the following finding regarding the nature of the employee's work injury:

> As a result of Mr. Patch's personal injury of October 21, 1996, he has a consequential traumatic bursitis condition that involves his right shoulder; a probable consequential impingement syndrome condition that involves his right shoulder; a probable chronic right trapezial strain condition; as well as neck pain which is more probable than not causally related to his personal injury of October 21, 1996.

The judge further concluded that the employee's weekly wage on the date of injury was $765.02 and that he had reached MMI from his work injury effective with service of an MMI report on February 10, 1999. The judge went on to deny the employee's claim for temporary total and/or permanent total disability benefits from and after May 27, 1999, on various grounds. 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

Permanent Total Disability

Pursuant to Minn. Stat. § 176.101, subd. 5, an employee is permanently and totally disabled if his work injury "totally and permanently incapacitates the employee from working at an occupation which brings the employee an income," provided that the employee meets the requirements of clauses (a), (b), or (c) of subdivision 5 -- in this case, the employee must have a 15% whole body impairment rating. Id., subd. 5(2)(b). For purposes of the statute, "'totally and permanently incapacitated' means that the employee's physical disability in combination with any one of clause (a), (b), or (c) causes the employee to be unable to secure anything more than sporadic employment resulting in insubstantial income." Minn. Stat. § 176.101, subd. 5. See also Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967).

The compensation judge concluded that the employee was not permanently and totally disabled from employment and that he had insufficient permanent partial disability to satisfy the requisite statutory threshold. In denying the employee's claim, the compensation judge expressly accepted the opinion of vocational expert Moncharsh, writing in his memorandum as follows:

> I accept the professional opinion of Ms. Jane K. Moncharsh as to Mr. Patch's employability since May 26, 1999 as probably true. As Ms. Moncharsh testified, Mr. Patch has had, and continues to have, the physical capacity, as well as the vocational capacity, for full-time competitive employment; that Mr. Patch is not employed on a full-time basis solely because he has chosen to accept a union pension that pays him approximately $36,000.00 a year -- a pension that limits his employment opportunities to jobs other than in Building and Construction Industry where he would have transferable skills; and that he did not look for alternative work (other than the Lonsdale summer job) that may pay a greater income because of his belief that jobs paying more than he was receiving from the City of Lonsdale may also have jeopardized his ongoing entitlement to the $3,000.00 a month in pension benefits.
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> I agree with Ms. Moncharsh that Mr. Patch voluntarily accepted part-time work rather than seeking full-time work as he only wanted

> to supplement his pension without jeopardizing his pension by pursuing a full-time job.
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> I, like Ms. Moncharsh, agree that Mr. Patch is a very pleasant individual who has the physical ability to do a wide variety of tasks, including light mechanic work, driving, equipment operating, tool crib work, cleaning, etc., and that he could perform a wide variety of jobs within not only his physical restrictions as identified by the physicians in the Functional Capacity Evaluation, but also consistent with his current daily activities. Suffice it to say, Mr. Patch has not sustained his burden of proof, as defined by Minn. Stat. § 176.021, that he has been, or is at the present time, permanently and totally disabled from all competitive employment.

The compensation judge also specifically concluded that the employee had "retired from the competitive labor market."

On appeal, the employee argues that the judge erred in accepting the opinion of Ms. Moncharsh because Ms. Moncharsh based her conclusions regarding the employee's employability on a Functional Capacities Evaluation [FCE] performed at the end of the employee's work hardening in February of 1998, rather than on the more significant restrictions subsequently recommended by Dr. Wei and also by Dr. Milan Schmidt. The employee further contends that, given the employee's testimony and the records of Dr. Wei, the judge erred in concluding that the employee had not been medically unable to continue working when he left his job with the employer in May of 1999, and that the judge also erred in determining that the employee had "retired."

We acknowledge that there is evidence in the record to support the employee's claim of permanent total disability. The employee was 58 years old on the date of hearing and has, at best, first grade reading and writing skills. He worked at physically strenuous labor for 35 years, and, if his treating physicians' restrictions are accepted, he is no longer able to do that work. In addition, vocational expert Mansfield testified that, given the employee's most recent restrictions, his poor reading and writing skills, his age, and his limited work experience outside of the construction industry, the employee is unlikely to secure anything but sporadic employment at an insubstantial income. However, the compensation judge was entitled to accept Ms. Moncharsh's opinion to the contrary. And, by accepting that opinion, and in finding that the employee was not medically unable to continue working, the compensation judge was also implicitly rejecting the most recent restrictions recommended by Drs. Wei and Schmidt.[1] A

[1] In fact, the compensation judge made no specific finding as to the restrictions, if any, necessitated by the employee's work injury, only that the employee had not established that "any loss of use of or restrictions involving [the employee's] right shoulder or neck . . . were a significant or a substantial contributing reason for terminating his employment . . . [or for] his failure to look for or secure other work." Dr. Boxall had indicated that the employee had no need for restrictions because the employee exhibited no evidence of ongoing injury. Dr. Flood suggested that some

compensation judge is not required to accept a treating physician's opinion on restrictions, and the compensation judge in the present case was entitled to accept the results of the employee's February 1998 FCE. We would further note that, while the employee testified that his work for the employer had aggravated his symptoms, he also testified that he left his job for economic reasons -- "[b]ecause I wasn't making enough money and I could get just as much with my pension. I couldn't get the hours in to make the money because I was off and on, off and on." Finally, the employee himself concedes that he looked for virtually no other work after leaving the employer. As for the judge's conclusion that the employee had "retired," that conclusion is reasonably inferrable from all the circumstances, despite the employee's denial.[2] For all these reasons, the record as a whole reasonably supports the compensation judge's decision to deny the employee's permanent total disability claim.

The compensation judge also concluded that the employee had not satisfied the permanent partial disability threshold for permanent total disability pursuant to Minn. Stat. § 176.101, subd. 5. Under other circumstances, we might have remanded the matter for reconsideration and further findings, because the parties submitted conflicting evidence as to the permanency ratings applicable to a number of conditions,[3] and the judge gave insufficient explanation for his decision. However, because substantial evidence, including the opinion of Ms. Moncharsh, supports the compensation judge's decision that the employee is not permanently and totally disabled, permanency thresholds aside, a remand at this point would serve no practical purpose. Therefore, to avoid both an unnecessary remand and any inappropriate res judicata effect on possible future claims, we deem it appropriate to vacate the judge's findings regarding permanent impairment and the employee's failure to satisfy the statutory threshold. The judge's denial of permanent total disability benefits is, however, affirmed on the grounds expressed above.

Temporary Total Disability

In conjunction with his appeal from the judge's denial of temporary total disability benefits, the employee contends that substantial evidence does not support the judge's conclusion that the employee reached MMI effective February 10, 1999, with service of Dr. Boxall's MMI report. We are not persuaded. There is no evidence of any significant improvement in the employee's condition after that date or that any physician reasonably anticipated any significant improvement after that date. See Minn. Stat. § 176.011, subd. 25. In fact, Dr. Wei, the employee's own treating physician, had indicated in February of 1998 that the employee had reached MMI, and we see no indication that he ever changed his opinion in that regard. MMI is a finding of ultimate fact, see Hammer v. Mark Hagen Plumbing & Heating, 435 N.W.2d 525, 41 W.C.D. 634

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restrictions would be prudent given the chronicity of the employee's complaints, but he did not delineate any specific limitations.

[2] The employee cites Behrens v. City of Fairmont, 533 N.W.2d 854, 53 W.C.D. 41 (Minn. 1995), for the proposition that retirement is not a defense to payment of permanent total disability benefits until the employee reaches the age of 67. The employee has simply misconstrued that case.

[3] For example, the employee's diabetes, hearing loss, and knee condition.

(Minn. 1989), and the employee has not made any arguments that would call the judge's decision into question. We therefore affirm the judge's decision on this issue.

The employee's remaining arguments regarding temporary total disability were essentially considered and disposed of in our review of his permanent total disability claim. That is, the record reasonably supports the judge's conclusion that the employee is physically capable of working, that he chose to accept his union pension and did not want to jeopardize that pension by looking for or finding other work as a laborer, and that the employee did not really look for any other employment following his retirement. The judge also reasonably concluded, based on the opinion of Ms. Moncharsh, that a job search would not have been futile. See Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). For all these reasons, we affirm the judge's denial of temporary total disability benefits.

Weekly Wage

The compensation judge used the 26-week averaging method to determine the employee's weekly wage, arriving at a figure of $765.02. See Minn. Stat. § 176.011, subd. 3. On appeal, the employee argues that the judge erred by applying the averaging formula in that his wage was neither "irregular" or "difficult to determine" within the meaning of the statute. We are not persuaded.

There was little or no testimony regarding the employee's wage on or prior to the date of injury. In his brief, the employee contends that he was hired to work 40 hours a week at $19.65 an hour, but he cites no specific evidence to this effect, and wage records indicate that the employee's weekly earnings and hours varied in the 26-week pre-injury period. Given this evidence, the judge did not err in concluding that the employee's weekly wage was "irregular" for purposes of applying the statutory formula, and we affirm.