

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

AVERY V. WESTERN COOP

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BYFORD AVERY, JR., APPELLEE,

v.

WESTERN COOP, AND COOPERATIVE MUTUAL INSURANCE COMPANY,
ITS WORKERS' COMPENSATION CARRIER, APPELLANTS.

Filed February 19, 2008. No. A-07-475.

SIEVERS, CARLSON, and MOORE, Judges.

MOORE, Judge.

INTRODUCTION

Byford Avery, Jr., sought workers' compensation benefits, alleging that he had sustained injuries while employed by Western Coop. The Nebraska Workers' Compensation Court, among other things, found that Avery's vocational rehabilitation counselor provided a convincing rebuttal of the opinion of the court-appointed vocational rehabilitation counselor, awarded Avery permanent total disability (PTD) benefits, and found that Avery was entitled to a waiting-time penalty and interest for the period between March 28 and July 10, 2005. Western and its workers' compensation insurance carrier (collectively Western) appealed, and the review panel affirmed the trial judge's award of PTD, as well as the trial judge's findings regarding rebuttal of the court-appointed vocational rehabilitation counselor's opinion and right to a waiting-time penalty and interest. From the order of the review panel, Western appeals to this court. For the reasons set forth herein, we affirm.

BACKGROUND

Avery was employed by Western as a truckdriver on April 3, 2003. On that date, Avery suffered injuries to his neck and back as a result of an accident arising out of and in the course of his employment by Western when he fell from a catwalk to the ground. Specifically, Avery sustained injuries to his cervical, thoracic, and lumbar spinal areas. Avery's employment with Western was terminated in October 2003, when Avery was unable to return to full-duty work.

In November 2003, Avery underwent a cervical discectomy and fusion at C5-6 and C6-7, which did not properly solidify, and in May 2004, Avery had to undergo a revision surgery. Avery treated primarily with Dr. John Barker, who connected to Avery's work-related accident Avery's cervical spine injury, a T3 transverse process fracture, and an exacerbation of Avery's previously asymptomatic degenerative disk disease in his lumbar spine.

Avery also underwent psychological treatment, which was related to his accident and injury. Western had Avery evaluated by Dr. Jennifer Bugg, who opined that Avery had suffered an exacerbation in his bipolar disorder and that the psychiatric treatment had been appropriate and related to the work-related accident and injury. Bugg further opined that Avery would benefit from a continued pain management referral.

Avery underwent a functional capacity evaluation (FCE) on September 21, 2005. The results of the FCE showed that Avery was capable of sedentary work with any task performed above waist level and light work for activities below his waist. Avery requires frequent position changes and should avoid ever lifting below his knees or above shoulder height. The FCE was determined to be "relatively" reliable by the physical therapist because of submaximal efforts by Avery secondary to anxiety or fear. Avery's permanent work restrictions based on the FCE and assigned by Barker were for a sedentary/light physical demand level and included the following: no bending, twisting, reaching overhead; no looking up with neck movement; no lifting from the floor to knees; and no lifting overhead. Avery was limited to walking on an occasional basis (sustained for 4 minutes, able to repeat), standing on an occasional basis for short duration, sitting frequently (sustained for 60 minutes), and alternating walking, sitting, and standing throughout the day.

The court-appointed vocational rehabilitation counselor, Carol Reddy, completed an initial evaluation on October 27, 2005, and submitted a report of her loss of earning capacity analysis dated December 27, 2005. In her initial evaluation report, Reddy outlined Avery's vocational history, which showed that Avery, who has a high school education, has been employed in such jobs as janitor, nursing assistant, newspaper carrier, lumber sorter, factory worker, and construction laborer. Avery has also worked in the hog confinement industry and as a truckdriver. Reddy analyzed Avery's transferable skills and conducted an employment analysis which showed that most of Avery's previous jobs fell into the category of medium work and unskilled employment, although a few of the jobs were considered light work and a few of the light- and medium-work jobs were considered semiskilled employment. The job of construction worker was considered heavy work and semiskilled employment.

In her December 27, 2005, report, Reddy outlined four factors she considered in analyzing Avery's loss of earning capacity. Reddy utilized the Labor Market Access Plus computer program to demonstrate the effect of Avery's restrictions on his ability to procure employment generally. Reddy stated that although this program was no longer being updated, the approach to assessing loss of access was still valid and had been the basis for subsequent programs developed by other experts in the vocational rehabilitation field. After developing Avery's vocational profile and eliminating occupations that would not be compatible with his physical restrictions, Reddy found his loss of access to suitable jobs to be approximately 49 percent. In order to evaluate Avery's general employability, Reddy conducted research in Avery's labor market area. Based upon this research, Reddy stated that Avery would be able to

utilize his existing skills and experience to return to work in a variety of jobs, including customer service representative; pharmacy technician; and in certain settings, quality assurance worker, assembler/light production worker, and security guard, which jobs pay wages ranging from \$7.25 to \$8.50 per hour. When compared to Avery's preinjury wage rate, Reddy determined that Avery could expect to experience a loss of wages between 33 percent and 43 percent.

Reddy noted that due to Avery's restrictions, he was no longer able to perform the tasks of his previous jobs in the medium- and heavy-work categories, but stated that the restrictions would not preclude Avery from performing tasks of jobs classified as sedentary or certain jobs in the light-work category. Reddy found nothing in the records she reviewed to indicate that Avery was incapable of maintaining full-time employment. Reddy opined that Avery was employable but had experienced a 45-percent loss of earning capacity as a result of his work-related accident and injuries.

Holly Berquist provided a report on February 28, 2006, of her labor market research for Avery. The purpose of this research was to determine if the jobs identified in Reddy's loss of earning power analysis were suitable for Avery and to identify any suitable jobs for Avery in the Alliance, Nebraska, labor market based on Avery's restrictions. Berquist detailed the research she conducted with respect to each of the employment options identified by Reddy. Berquist concluded that the postinjury employment options identified by Reddy were inappropriate for Avery in that he would not meet the hiring qualifications for work as an assembler/light production worker, security guard, pharmacy technician, quality assurance worker, or customer service representative. Berquist outlined the methodology used in her own labor market research and reviewed the 20 occupations with the "most openings" for the Panhandle region based on data from the Nebraska Department of Labor. Berquist reviewed these jobs based on Avery's restrictions and lack of clerical skills. Berquist determined that Avery did not have the physical capacity and/or skill level to work in these 20 jobs. Berquist's research further indicated that Avery does not have the physical capacity or required skills to compete for jobs that are available with the major employers in the Alliance area. Berquist found that Avery would not be employable in the Alliance and Scottsbluff, Nebraska, area based on his restrictions and lack of clerical skills. The only suitable job Berquist found was for a hotel front desk clerk in Alliance, which had a starting pay of \$5.30 per hour and was filled the week of February 20, 2006. Berquist concluded that Reddy's opinion that Avery would be employable in various jobs was not accurate and found no suitable jobs for Avery in Reddy's recommended postinjury employment options. Berquist stated that the results of her research indicated that Avery would experience great difficulty in securing full-time employment in the Alliance and Scottsbluff labor market and that Avery appeared to be unemployable due to his permanent restrictions and lack of clerical skills.

On March 2, 2006 Berquist provided her loss of earning capacity rebuttal report. Berquist's report included information concerning Avery's education, occupational skills, and work history. Berquist analyzed Avery's transferable job skills and noted that Avery reports minimal typing skills and very limited computer skills. In reviewing Avery's transferable skills, Berquist utilized the McCronskey Vocational Quotient System, which revealed that Avery had no practical transferability of skills to other occupations as a result of his permanent work restrictions. Berquist reviewed the elements from *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288

N.W.2d 482 (1980), used to determine the earning power of injured workers who have suffered a permanent impairment to the body as a whole. Berquist opined that Avery has suffered a 100-percent loss of access to his labor market based on his restrictions at the sedentary/light physical demand level, lack of postsecondary education, and lack of clerical skills for sedentary work in the Alliance and Scottsbluff labor market. Berquist concluded that Avery had lost 100 percent of his ability to earn wages in his occupation at the time of injury or alternative entry level jobs, that Avery was not able to perform any employment tasks, and that he did not have the ability to secure and maintain employment on a full-time permanent basis.

In specifically addressing Reddy's report, Berquist identified certain concerns. Berquist spoke with the author of the software used by Reddy, who informed Berquist that no validity testing had been completed on the software and that the software was never meant to be a test or measurement. Berquist expressed her opinion that it was inappropriate to use a software program to determine loss of access under such circumstances and opined that the loss of access reported by Reddy could not be validated. Berquist also expressed her opinion that Reddy did not complete adequate labor market research because Reddy's file did not include records of contact with employers in the Alliance and Scottsbluff labor market. Berquist stated that it appeared that in identifying jobs, Reddy assumed each job identified was suitable given Avery's permanent work restrictions and lack of computer and typing skills and was filled with external rather than internal job candidates. Berquist set forth her own research concerning the jobs identified by Reddy and concluded that her own research indicated that the postinjury employment options identified by Reddy were inappropriate for Avery in that Avery would not meet the hiring qualifications for work in these positions. Berquist also stated that Reddy's opinion regarding wage loss could not be substantiated if the postinjury employment occupations identified were not suitable for Avery and that Reddy's opinions in this regard were thus inaccurate.

Reddy completed a report on May 5, 2006, addressing the "errors" identified by Berquist in Reddy's previous report. Reddy discussed her use of the Labor Market Access Plus computer program. Reddy stated that she was uncertain whether any of the available software programs have undergone validity testing. Reddy stated further that in her experience, when using the two programs at issue here on the same injured worker, the McCronskey system, when used correctly, yielded similar results to the program used by Reddy. Reddy reviewed the resources used by Berquist in evaluating Avery's employability. Reddy stated that Berquist's failure to contact directly certain employer's in Avery's labor market area resulted in an incomplete evaluation. Reddy provided examples of jobs she had located by contacting certain employers directly and asserted that such jobs were within Avery's functional abilities. Reddy asserted that it appeared Berquist had ignored these jobs when determining that Avery was not employable. Reddy stated that, based upon the recital of appropriate jobs set forth in her May 2006 report, the jobs located were appropriate for Avery and that accordingly, Berquist's concerns regarding the wage data in Reddy's previous report were immaterial. Reddy reasserted her opinions that Avery was employable and that he had sustained a 45-percent loss of earning capacity.

Avery filed a petition in the compensation court on April 15, 2005, and a trial was held before a single judge of the compensation court on May 16, 2006. The trial judge entered an award of benefits on August 25. The judge found that Avery was temporarily totally disabled from and including April 5, 2003, through July 7, 2005, and thereafter became permanently and

totally disabled. The judge found that Avery was entitled to benefits as provided under the Nebraska Workers' Compensation Act. The judge found that Western should pay Avery the sum of \$338.23 per week for 117.86 weeks of temporary total disability and thereafter a like sum each week for so long as Avery remains permanently and totally disabled. The judge ordered Western to continue to provide and pay for such reasonable and necessary medical care as may be required by Avery's accident and injuries and gave Western credit for indemnity and medical benefits already paid.

The trial judge noted Avery's claim for a waiting-time penalty for indemnity benefits which were discontinued by Western on March 28, 2005, and resumed on August 11. The judge determined that there was no reasonable controversy concerning Avery's ongoing temporary total disability until July 7, 2005, when Avery was pronounced at maximum medical improvement as to both his neck and his lower back and no reasonable controversy between July 8 and 10 that Avery had sustained a 28-percent whole body impairment. The judge found that the benefits payable during the period between March 28 and July 10 were in excess of 30 days past due and that Avery, accordingly, was entitled to a penalty plus interest. The judge awarded penalty and interest from March 28 through July 7 based on the total temporary disability rate and from July 8 through 10 based on Avery's 28-percent whole body impairment rating.

In determining the nature and extent of Avery's disability, the trial judge reviewed Avery's treatment and evaluation history and found no evidence that Avery had attempted to manipulate the FCE results. The judge then reviewed the opinions of Reddy and Berquist, noting that Reddy was the court-appointed counselor and that Berquist's opinions were provided in rebuttal of Reddy's. The judge found the explanations offered by Reddy for her conclusions as to Avery's loss of earning capacity to be somewhat conclusory and stated that Berquist provided a convincing rebuttal of Reddy's opinions in both her trial testimony and in her rebuttal loss of earning capacity evaluation. The judge stated:

Particularly compelling to the Court is the limited number of positions which either vocational counselor was able to point to in the geographic area which would fit within [Avery's] restrictions. In comparing [Avery's] work history which is outlined in . . . Berquist's report, it is clear that he has primarily performed manual labor, livestock management, truck driving, or other medium to heavy work. The positions suggested by . . . Reddy include, but are not limited to, such positions as motel desk clerk. Clearly, this type of employment would be a major departure from anything which [Avery] has previously performed or for which he has experience or training. So while it might be possible to find some job in the geographical area that [Avery] may be able to do considering his restrictions, that does not mean that the job is suitable employment when considering [Avery's] previous background. Further, the location of one or a few jobs does not mean that [Avery] is any less than permanently and totally disabled.

The trial judge was persuaded by Berquist's opinion, stating that her opinion effectively rebutted that of Reddy. The judge found, based upon the opinions of Avery's treating physicians, the results of the FCE, and the opinion of Berquist, together with the other factors set forth in *Sidel v. Travelers Ins. Co.*, 205 Neb. 541, 288 N.W.2d 482 (1980), that Avery was permanently and totally disabled.

Western appealed to the review panel of the compensation court, and on March 28, 2007, the review panel entered an order of affirmance on review. The review panel first considered Western's argument that the trial judge erred in concluding that the opinion of the court-appointed vocational rehabilitation counselor, Reddy, had been rebutted. The review panel recognized that the burden was placed upon Avery to prove the incorrectness of Reddy's opinion. The review panel observed that while the trial judge relied upon the loss of earning power evaluation Avery obtained from Berquist, together with other information, in concluding that Avery was permanently totally disabled, the trial judge's award contained no specific reference to the presumption of correctness applicable to Reddy's opinion. The review panel noted that the trial judge had indicated that Reddy's opinion was "somewhat conclusory" and had weighed Reddy's and Berquist's opinions at some length before relying upon the rebuttal opinion and other evidence to conclude that Avery was entitled to PTD benefits. The review panel concluded that the trial judge's statements were sufficient to determine that the trial judge considered the presumption of correctness to have been rebutted.

The review panel found no merit to Western's arguments concerning the award of PTD benefits, since there was evidence in the record, including the rebuttal opinion and Avery's testimony, to support the trial judge's finding that Avery was permanently and totally disabled.

Finally, the review panel considered Western's argument that the trial judge had erred in concluding that there was no reasonable controversy regarding Avery's entitlement to temporary total disability benefits for the period between March 28 and July 10, 2005, and the award of a waiting-time penalty and interest. The review panel stated whether a reasonable controversy existed in this case was a fact question, that no unanswered question of law was involved, and that the trial judge weighed the facts regarding Western's interruption of indemnity payments and concluded that there was no reasonable controversy. The review panel determined that the trial judge was not clearly wrong in reaching such a conclusion. Western subsequently perfected its appeal to this court.

ASSIGNMENTS OF ERROR

Western asserts, consolidated and restated, that the trial judge erred in (1) concluding that the opinion of the court-appointed rehabilitation counselor was rebutted, (2) concluding that Avery was permanently and totally disabled, (3) finding that Avery was entitled to a waiting-time penalty and interest for the period between March 28 and July 10, 2005, and (4) failing to provide a reasoned decision.

STANDARD OF REVIEW

Pursuant to Neb. Rev. Stat. § 48-185 (Reissue 2004), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Knapp v. Village of Beaver City*, 273 Neb. 156, 728 N.W.2d 96 (2007). Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Ortiz v. Cement Products*,

Inc., 270 Neb. 787, 708 N.W.2d 610 (2005). With respect to questions of law in workers' compensation cases, an appellate court is obligated to make its own determination. *Id.*

ANALYSIS

Opinion Was Rebutted.

Western asserts that the trial judge erred in concluding that the opinion of the court-appointed rehabilitation counselor as to Avery's loss of earning capacity was rebutted. Under Neb. Rev. Stat. § 48-162.01(3) (Cum. Supp. 2006), a loss of earning power evaluation performed by a vocational rehabilitation counselor selected by the parties is entitled to a rebuttable presumption of correctness. *Frauendorfer v. Lindsay Mfg. Co., Inc.*, 263 Neb. 237, 639 N.W.2d 125 (2002). A rebuttable presumption is generally defined as a presumption that can be overturned upon the showing of sufficient proof. *Id.* In all cases not otherwise provided for by statute or by the Nebraska Evidence Rules, a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. *Frauendorfer, supra*. This rule applies to the rebuttable presumption that an opinion regarding loss of earning capacity expressed by a vocational rehabilitation counselor appointed or selected pursuant to § 48-162.01(3) is correct. *Frauendorfer, supra*. In determining whether the presumption contained in § 48-162.01(3) has been rebutted, the single judge is required to make factual findings. *Frauendorfer, supra*.

Berquist and Reddy clearly had differing opinions as to Avery's loss of earning capacity. Although the trial judge in this case did not explicitly discuss the presumption of correctness attached to Reddy's opinion as to Avery's loss of earning capacity or the burden of proof necessary to rebut that opinion, the judge identified Reddy as the court-appointed vocational rehabilitation counselor and found that Berquist provided an effective and convincing rebuttal of Reddy's opinion. The judge found that Reddy's opinions were "somewhat conclusory" and clearly weighed the opinions of Berquist and Reddy against one another. The single judge of the Workers' Compensation Court is the sole judge of the credibility of the witnesses and the weight to be given their testimony, even where the issue is not one of live testimonial credibility. *Swanson v. Park Place Automotive*, 267 Neb. 133, 672 N.W.2d 405 (2003). The trial judge apparently found Berquist's opinion to be more credible than Reddy's opinion. A determination of whether Berquist's opinion rebutted Reddy's opinion was a question of fact for the court to consider. Given the record before us, we cannot conclude that the trial judge was clearly wrong in finding that Reddy's opinion was rebutted by Berquist's opinion.

Avery Permanently Totally Disabled.

Western asserts that the trial judge erred in concluding that Avery was permanently and totally disabled. Total and permanent disability contemplates the inability of the worker to perform any work which he or she has the experience or capacity to perform. *Frauendorfer, supra*. It does not mean a state of absolute helplessness but means disablement of an employee to earn wages in the same kind of work, or work of a similar nature, that he or she was trained for or accustomed to perform, or any other kind of work which a person of his or her mentality and attainments could do. *Id.* Whether a plaintiff in a Nebraska workers' compensation case is totally and permanently disabled is a question of fact. *Id.*

In testing the sufficiency of the evidence to support the findings of fact made by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, and the factual findings by the compensation court have the same force and effect as a jury verdict in a civil case. *Worline v. ABB/Alstom Power Integrated CE Services*, 272 Neb. 797, 725 N.W.2d 148 (2006). If the record contains evidence to substantiate the factual conclusions reached by the trial court in workers' compensation cases, an appellate court is precluded from substituting its view of the facts for that of the compensation court. *Id.* We have considered the evidence in the light most favorable to Avery, and as did the review panel, we find that with the receipt of Berquist's opinion and the other evidence in the record, including Avery's testimony and Barker's records, there was clearly evidence to support the trial judge's finding that Avery was permanently and totally disabled. Western's assignment of error is without merit.

Avery Entitled to Penalty and Interest.

Western asserts that the trial judge erred in finding that Avery was entitled to a waiting-time penalty and interest for the period between March 28 and July 10, 2005. Neb. Rev. Stat. § 48-125 (Cum. Supp. 2006) authorizes a 50-percent penalty payment for waiting time involving delinquent payment of compensation and an attorney fee, where there is no reasonable controversy regarding an employee's claim for workers' compensation benefits. *Soto v. State*, 269 Neb. 337, 693 N.W.2d 491 (2005), *modified on other grounds* 270 Neb. 40, 699 N.W.2d 819. Whether a reasonable controversy exists under § 48-125 is a question of fact. *Guico v. Excel Corp.*, 260 Neb. 712, 619 N.W.2d 470 (2000). A reasonable controversy under § 48-125 may exist (1) if there is a question of law previously unanswered by the appellate courts, which question must be answered to determine a right or liability for disposition of a claim under the Nebraska Workers' Compensation Act, or (2) if the properly adduced evidence would support reasonable but opposite conclusions by the Nebraska Workers' Compensation Court concerning an aspect of an employee's claim for workers' compensation, which conclusions affect allowance or rejection of an employee's claim, in whole or in part. *Bixenmann v. H. Kehm Constr.*, 267 Neb. 669, 676 N.W.2d 370 (2004). To avoid the penalty provided for in § 48-125, an employer need not prevail in the employee's claim, but must have an actual basis in law or fact for disputing the claim and refusing compensation. *Dawes v. Wittrock Sandblasting & Painting*, 266 Neb. 526, 667 N.W.2d 167 (2003), *disapproved on other grounds*, *Kimminau v. Uribe Refuse Serv.*, 270 Neb. 682, 707 N.W.2d 229 (2005).

Western directs us to information in the record showing that in March 2005, Avery canceled certain doctor appointments. Western argues that Avery was not cooperating with his doctors or case manager, that there was authority under the Nebraska Workers' Compensation Act for its suspension of benefit payments, and that there was a reasonable controversy as to Avery's entitlement to benefits. We agree with the review panel's conclusion that no unanswered question of law is involved. The trial judge weighed the facts regarding Western's interruption of indemnity payments and determined that there was no reasonable controversy. We are unable to conclude that the trial judge was clearly wrong in making this determination.

Trial Judge Provided Reasoned Decision.

Western asserts that the trial judge erred in failing to provide a reasoned decision. Western's specific contentions concern the trial judge's findings regarding the rebuttal of Reddy's opinion by Berquist's opinion and the award of PTD benefits. Our review of the award does not support Western's contentions, and therefore, Western's assignment of error is without merit.

CONCLUSION

The trial judge was not clearly wrong in determining that Reddy's opinion as to Avery's loss of earning capacity was rebutted by Berquist's opinion, that Avery was permanently and totally disabled, and that Avery was entitled to a waiting-time penalty and interest. The trial judge provided a reasoned decision in conformity with Workers' Comp. Ct. R. of Proc. 11 (2006). Accordingly, we affirm the review panel's decision affirming the award entered by the trial judge.

AFFIRMED.