

NO. A07 - 932

STATE OF MINNESOTA
IN SUPREME COURT

Mary R. Olds,

Employee-Respondent,

vs.

Lutheran Social Services,

Employer-Relator,

and

Self -Insured, administered by CompCost, Inc.,

Insurer,

and

Twin Cities Spine Center,

Intervenor

EMPLOYEE - RESPONDENT'S BRIEF

Steven M. Bradt (#149020)
BRADT LAW OFFICES, P.A.
415 SE 13th Street, Suite 100
Grand Rapids, MN 55744
218-327-1235

David L. Christianson (#146067)
CRONAN, PEARSON, QUINLIVAN, P.A.
1201 Marquette Ave, Suite 110
Minneapolis, MN 55403
612-332-1300 ext. 106

Attorney for Employee-Respondent

Attorney for Employer-Relator

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STATEMENT OF CASE

The case before the Court involves two common and basic workers' compensation questions:

1. Is the Employee permanently and totally disabled?
2. Is the insurer entitled to an offset for the SSDI benefits which the Employee is receiving?

The Employee, Mary Olds, was already receiving SSDI benefits when she went to work for the Employer-Relator in 2002. In fact, the Employee had been found eligible for SSDI benefits commencing August 14, 1997. (A. 8, SSDI Decision p.4)¹ This was a full five (5) years before she ever began working for the Employer-Relator. She was awarded SSDI benefits following a hearing on December 9, 1998. As noted by the WCCA, the SSDI benefits were awarded based upon "major depression, recurrent, and fibromyalgia with headaches and chronic pain syndrome". (A. 69, WCCA p.8) The Employee worked part time for the Employer-Relator to supplement her income but was required to remain

¹ Appendix references are to the Appendix contained in the Brief of Employer-Relator, not reprinted herein

below a certain level of earnings to maintain her eligibility for SSDI benefits.

(T.37-38)

The Employee was hired as a direct support person to provide full patient care, including lifting and physical transfers. (T.38) At the time she began this job, the Employee did not have any low back problems or restrictions which limited her ability to *physically* perform her job. (T.38-39) After suffering injuries to her low back in 2002 and 2003, she became significantly and permanently disabled.

Following a hearing, the Compensation Judge found that the Employee was permanently and totally disabled but that the Employer-Relator was entitled to an offset in the amount of her monthly SSDI benefit. The Employer-Relator appealed the finding of permanent total disability and the Employee appealed the offset determination.

In its decision served and filed April 9, 2007, the WCCA affirmed the finding of permanent total disability and reversed the SSDI offset award. The Employer-Relator have taken an appeal from that decision.

ISSUES PRESENTED

1. WAS THE WCCA AFFIRMATION OF THE PERMANENT TOTAL DISABILITY FINDING MANIFESTLY CONTRARY TO THE EVIDENCE?

2. DID THE WCCA PROPERLY SUBSTITUTE ITS FINDINGS IN REVERSING THE SSDI OFFSET ?

The 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 records as submitted." Minn. Stat. Sec. 176.421, sub. 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, 368 N.W. 2d 54, 59 (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. Similarly, "[f]act findings 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 Products, Inc., 304 Minn 196, 201, 229 N.W.2d 521, 524 (1975). Fact findings 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.

ARGUMENT

- 1. The Finding of the Compensation Judge, as Affirmed by the WCCA, that the Employee is Permanently Totally Disabled, is Supported by Substantial Evidence in View of the Entire Record.**

The Employee worked limited hours, *by choice*, when she was hired by the Employer-Relator in 2002. (T.40) The WCCA correctly notes there was no evidence "that the Employee was limited to working part time due to any medical restrictions caused by her pre-existing low back condition or by the depression, fibromyalgia, or chronic pain syndrome for which she was receiving

SSDI." (A. 66, WCCA p.5) The Employee testified at the hearing that she was able to perform all of her job duties without assistance, needed no medical care and had no lost time prior to the first of her two low back injuries (T. 40-41).

As a licensed LPN (A. 54, Finding 1), the Employee was physically and vocationally capable of finding and holding competitive employment at the time she was hired by the Employer-Relator. Her employment and earning options were limited only by her receipt of SSDI benefits. Those limitations were temporary in nature, applicable for only so long as she chose to receive SSDI benefits. Had she been able to return to full-time employment as an LPN, she could certainly have earned more than the \$876/month she receives as SSDI.

Any number of future employment and earning scenarios were available to the Employee before she injured her back in 2002 and 2003. She testified that her major depression is controlled with medication. (T. 87) Although she still has fibromyalgia (T.88), her most disabling condition is now her low back (T.88) Simply put, the Employee was not permanently totally disabled when she went to work for the Employer-Relator in 2002. She became permanently totally disabled as a result of the back injuries she sustained in 2002 and 2003.

The Employer-Relator concedes in its brief that "there is no dispute that the Employee's low back and left leg symptoms became more constant and pronounced after the 8/20/03 injury and continued through the date of hearing." (Employer-Relator's Brief, p.7) The Compensation Judge properly found that the Employee is no longer able "to find or hold competitive employment or employment which would result in anything more than insubstantial income from sporadic employment". (A. 57, Finding 33)

A comparison of the Employee's earnings before the work injuries (in a job competitively obtained and performed) with her post-injury earnings is not relevant. Since August 24, 2003 she has not been competitively employable. (A. 57, Finding 36) The WCCA correctly summarizes the relevant law, noting that "the fact that an injured Employee earns a marginal income does not preclude a determination of permanent total disability." (A. 66, WCCA p.5, citing Bertsch v. Varnum Lumber and Fuel Company, 228 N.W. 2nd 228, 27 WCD 786 (Minn. 1975)). The WCCA also notes that, "as a general rule, whether an employee's income is insubstantial is not determined by comparing the employee's pre- and post- injury earnings." (A. 66, WCCA p.5, citing Weishaar v. Radisson Hotel South, slip op. (WCCA 9/24/02)). The WCCA goes on to conclude that "in other

words, what constitutes an insubstantial income does not change relative to the Employee's pre-injury wage." (A. 66, WCCA p.5, citing Detmar v. Casco Corp., 60 WCD 81 (WCCA 2000)).

In this case, the Employee was competitively employable when she was hired by the Employer-Relator in 2002. As a result of her 2002 and 2003 back injuries, she is now permanently totally disabled.

A. The Employer's "windfall" argument is without merit and is, in fact, a common occurrence in permanent total disability claims for low wage earners

Under the provisions of Minn. Stat. Sec. 176.101, subd.4 (2000), an Employee who is permanently totally disabled is entitled to a legislatively mandated minimum rate (65% of the statewide average weekly wage). As noted by Employer-Relator, the minimum rate to which the Employee is entitled for permanent total disability is \$457.00 per week. (Employer-Relator Brief p. 3) In pointing out this "windfall", the Employer- Relator fails to mention the hundreds, if not thousands, of other injured Minnesota workers who receive a similar "windfall" when deemed permanently

totally disabled. In a great many cases, a low wage earner receives substantially more in permanent total disability benefits than he/she was receiving in wages. If this truly represents a “windfall” for a severely injured person and an unjust burden upon insurers, then it is up to our Legislature to change the law.

2. The WCCA’s Reversal of the SSDI Offset is in Accordance with the Applicable Law and Supported by the Trial Record

The WCCA did not misstate the factual record or misinterpret the law regarding the SSDI offset. However, the Compensation Judge misstated the factual record in coining the phrase “low back chronic pain syndrome” to describe the Employee’s condition at the time she was awarded SSDI benefits in 1999 (A. 57, Finding 5) This phrase never appears in the SSDI award and there is no evidence in the record to support such a conclusion. The only Social Security medical documentation in the trial record is the February 22, 1999 SSDI decision. (A. 5, SSDI Decision)

The SSDI decision focuses on the Employee’s fibromyalgia, a non-specifically defined chronic pain syndrome, and her depression. There are no references to any

objective medical evidence such as MRI's or EMG's which would document a low back condition. Further, there are no references to radicular symptoms, sciatica, or any of the other conditions which have disabled the Employee since her work injuries in 2002 and 2003. The Employee's "chronic pain syndrome" was not due to low back problems. Rather, it was diagnosed as "secondary to the fibromyalgia" (A. 6, SSDI Decision p.2, opinion of Dr. May)

After reviewing the trial record, the WCCA correctly found "no substantial evidence supporting a conclusion that the employee's low back condition was a factor in the award of SSDI benefits." (A. 69, WCCA p.8).

Employer-Relator asks this Court to assume, as a "very significant fact", that the Employee's benefits were "reviewed and renewed at some point after the initial award and that this review most likely occurred in approximately 2002".

(Employer-Relator Brief p.22). Other than the Employee's vague trial testimony and the Employer-Relator's speculation, there is no evidence in the trial record that the Employee's SSDI eligibility was ever reviewed. Assuming, arguendo, that a review did occur sometime after 1999, any number of questions remain unanswerable from the evidence in the record, among them:

- (1) Exactly when did the review occur?
- (2) By whom was the review performed?
- (3) What, if any, medical records were reviewed and considered?
- (4) What, if any, information was provided by the Employee?
- (5) What is the standard used to determine eligibility for ongoing SSDI benefits?

Another of Employer-Relator's arguments is that the Employee testified at the workers' compensation hearing that her primary disabling condition is now her low back. (Employer-Relator Brief p.22) While this is most certainly true, following two back injuries while working for the Employer-Relator, it is irrelevant. The more relevant inquiry is whether her entitlement to SSDI benefits was "occasioned by" the same condition which now renders her permanently totally disabled for workers' compensation purposes. The WCCA has correctly answered that question in the negative.

This Court has addressed the issue of the SSDI offset in a permanent total disability claim. In Kloss, this Court set forth three prerequisites to be met before an Employer/Insurer is entitled to the offset provisions under Minn. Stat. 176.101, subd.4:

- (1) The injured Employee must be permanently and totally disabled;
- (2) Payment of \$25,000 in weekly compensation is made; and

(3) the social security disability benefits are occasioned by the same injuries which gave rise to workers' compensation benefits.

Kloss v. E & H Earthmovers, 472 N.W.2d 109, 112 (Minn.1991).

The WCCA has addressed the meaning of "occasioned by." In Hill, the WCCA held that "by definition, the words 'occasioned by' are the equivalent of 'caused by' Hill v. Ed Lutz Constr., 39 WCD 111, 114 (WCCA 1986). The Court went on to note that the Compensation Judge was required to examine the social security records to determine the basis of an award of benefits (Hill at p. 114).

In addition, the Court recognized the Employer and Insurer's burden of proof on this issue, holding that "simply put, the Employer and Insurer have failed to sustain their burden in their claim to entitlement of the statutory offset" (Hill at p. 114). While the Employee clearly has the burden of proof in establishing her claim for permanent total disability benefits, the burden switches to the Employer and Insurer when they claim entitlement to the statutory offset.

In the present case, the only evidence in the record which tells us why the Employee was receiving SSDI benefits is the 1999 decision of ALJ Roger W. Thomas.(A. 5) A careful reading of that decision does not support the Employer-Relator's contention that the Employee had a low back condition which was a factor

in the award of SSDI benefits. Based upon all of the evidence in the record, the Employee's entitlement to SSDI benefits in 1999 was "occasioned by" major depression, fibromyalgia with headaches and a chronic pain syndrome. (A. 69, WCCA p.8) The Employer-Relator is not entitled to the statutory SSDI offset in this case.

B. The Employee is Not Experiencing a "Windfall" by Her Receipt of Both SSDI and Permanent Total Disability Benefits

Having established that her permanent total disability is a result of the work injuries, the Employee is entitled to the minimum weekly benefit pursuant to Minn. Stat. Sec. 176.101, subd.4 (2000). The Employer-Relator, failing in its burden of proof, have not established that her SSDI benefits were "occasioned by" the same injuries which made her permanently and totally disabled. Therefore, the Employee is entitled to receipt of both benefits.

There is no "double recovery" or "duplication of benefits" where an injured person is receiving disability benefits from two different sources and for two different disabling conditions. The Employer and Insurer are responsible to pay permanent total disability benefits in this case because the Employee became

disabled as a result of her work injuries. The legislature has determined that the Employee, and all others similarly situated, shall receive a minimum benefit which exceeds her pre-injury wage. This is not unreasonable in light of her permanently disabled condition.

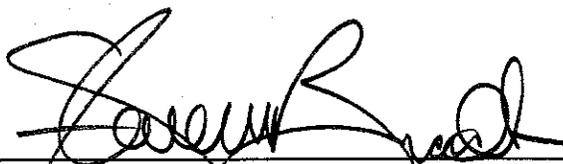
The Employee is also receiving SSDI benefits under a federal disability program, for conditions which differ from, and pre-existed, her work injuries. As noted by the Employer-Relator, Minn. Stat. 176.101, Subd. 4 allows for an offset of SSDI benefits when those benefits are "occasioned by the same injury or injuries which give rise to" the permanent total disability benefits. (Employer-Relator Brief p.23) The statute does not provide for an offset in every case, however, recognizing that simultaneous receipt of SSDI and permanent total disability benefits does not necessarily represent a duplication of benefits in every case. This is one of those situations where no duplication exists.

CONCLUSION

The Employer-Relator is really asking this Court to reverse the WCCA decision because the decision seems "unfair." The numerous references to the Employee's supposed "windfall" imply that the Employee is somehow fortunate

to have been injured under these circumstances.. It is important to remember that the Employee was not permanently and totally disabled from employment until after she was hurt while working for the Employer-Relator. In this particular case and under these particular facts, the Employer-Relator may be unhappy with its obligation to pay full benefits at the minimum rate. That unhappiness, however, does not change the fact that the WCCA decision is thoroughly supported by the applicable law and the trial record. For these reasons, the Employee respectfully requests that this Court affirm the decision of the WCCA in all respects.

Respectfully submitted,



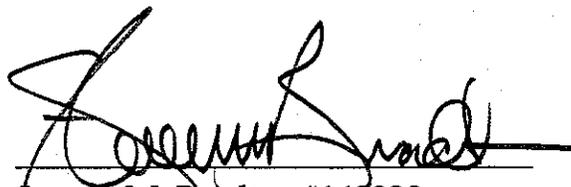
Steven M. Bradt #149020
Bradt Law Offices, P.A.
415 SE 13th St, Suite 100
Grand Rapids, MN 55744
(218) 327-1235

Dated: June 25, 2007

CERTIFICATE OF BRIEF LENGTH

I certify that this Brief conforms to the page, word and line requirements set forth in Rule 132.01 of the Minnesota Rules of Civil Appellate Procedure for briefs in proportional spaced font. This Brief contains 2724 words, 325 lines and is formatted in Word Perfect, version 11.

Dated: June 25, 2007

A handwritten signature in black ink, appearing to read "Steven M. Bradt", written over a horizontal line.

Steven M. Bradt #149020

Bradt Law Offices, P.A.

415 SE 13th St, Suite 100

Grand Rapids, MN 55744

(218) 327-1235

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).