[Redacted to remove Social Security Number.]

LLOYD D. BACK, Employee, v. CREST ENG'G and SENTRY CLAIMS SERV., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 12, 1992

File No. [Redacted to remove SSN.]

HEADNOTES

PRACTICE & PROCEDURE - EXPEDITED HEARING; JOB SEARCH. Where continuing benefits were awarded in a formal expedited hearing based on the employee's request that benefits not be discontinued, the compensation judge erred in not receiving evidence or making a finding as to the employee's job search, and a remand on that issue is required.

Vacated and remanded.

Determined by Rieke, C.J., Wilson, J., and Wheeler, J.
Compensation Judge: Jeanne E. Knight

OPINION

PAUL V. RIEKE, Judge

At issue in this appeal is the question of whether the compensation judge properly declined to receive evidence and make findings with regard to whether or not the employee had engaged in a reasonably diligent job search.

The employee sustained an admitted work-related injury on June 18, 1990. Following a period of temporary total disability, the employee returned to work in a light-duty capacity. The employee continued in this capacity until January 11, 1991, when he was laid off for economic reasons.

Following the layoff, the employee was paid benefits, including temporary total disability and rehabilitation. On July 30, 1991, the employer and insurer filed a Notice of Intention to Discontinue Benefits (NOID). The basis of the NOID was the contention of the employer and insurer that the employee had no further injury-related job restrictions and that, because he was laid off for economic reasons unrelated to his injury, the employee was not entitled to benefits. Pursuant to the employee's request, a § 176.239 Administrative Conference was held. In an August 28, 1991, Interim Administrative Decision, a rehabilitation and medical specialist of the Department of Labor and Industry allowed the employer and insurer to discontinue benefits on the ground that the employee's symptoms were no longer a substantial contributing factor in the employee's unemployment. The employee requested a formal hearing.

Pursuant to the employee's request, a hearing was held before a compensation judge of the Office of Administrative Hearings. At the hearing, the employer and insurer attempted to raise the issues of wage rate, extent of permanent partial disability, and job search. The employee declined to agree to an expansion of issues. During the course of the hearing, the compensation judge sustained an objection by the employee to questions on the issue of job search. The compensation judge subsequently determined that the employee was still under work restrictions related to his injury, and temporary total and temporary partial wage loss benefits were awarded from August 22, 1991, through the date of the hearing and continuing. The employer and insurer appeal.[1]

DECISION

Brief of Employee

The employer and insurer submitted their brief on appeal to the Workers' Compensation Court of Appeals on March 18, 1992. Inasmuch as the transcript of the hearing below was certified to this court on February 21, 1992, the brief of the employer and insurer was timely. Pursuant to Minn. R. 9800.0900, subp. 3, the employee's response brief was due no later than April 13, 1992. The response brief was filed April 17. On April 27, the employer and insurer moved that the employee's response brief be stricken from consideration as untimely, pursuant to Minn. R. 9800.0900, subp. 6. As of the date of this decision, no response has been received by the employee. Pursuant to the rule, the response brief of the employee was not considered in the determination herein.

Job Search Issue

The compensation judge concluded that the employee continued to have work restrictions related to his injury. Upon this determination, the compensation judge awarded the employee temporary total or temporary partial benefits, as his earnings would warrant, from August 22, 1991. We conclude that the compensation judge should have considered evidence and made findings regarding whether the employee had made a diligent job search.

At the hearing, the attorney for the employer and insurer indicated that she had reached an agreement with the employee's attorney to permit expansion of the scope of the hearing to litigate additional issues, including job search. (Record at 10). The employee's attorney, however, said that he wanted to limit determination "to the issue of what was at the NOID [conference]." (Id.). The compensation judge sustained a later objection by the attorney for the employee to questioning involving the employee's job search by the attorney for the employer and insurer. Upon the employee's objection, the attorney for the employer and insurer argued that a job search was required to prove entitlement to wage-loss benefits. (Id. at 61-62).

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[1] The employee cross-appealed, claiming entitlement to penalties. Because the Notice of Cross-Appeal was not timely, however, the cross-appeal was dismissed by Order of this court on March 31, 1992.

In Meline v. Tekcom, 41 W.C.D. 52 (1988), this court held that a compensation judge had not improperly made a finding on temporary partial disability benefits at an expedited hearing related to an Objection to Discontinuance of temporary total disability. Therein we noted:

> The purpose of Minn. Stat. §§ 176.238 and 176.239 is to establish an expedited procedure for the resolution of disputes pertaining to weekly benefits, to wit, temporary total, temporary partial, or permanent total compensation. Minn. Stat. § 176.239, subd. 1 (1987). Weekly benefits are a wage substitute which in most cases are an employee's only means of livelihood. Thus, it is no surprise that the legislature would establish a procedure to resolve these matters as quickly as practical. Under this scheme, the parties are entitled to an expeditious resolution of weekly benefit issues. See Violette [v. Midwest Printing], 415 N.W.2d 318 at 321, 40 W.C.D. 445 at 450 (Minn. 1987) . . . . The result then is if an employee is entitled to weekly benefits, they continue with little, if any interruption. If not so entitled, benefits are discontinued and an employee must thus comply with the workers' compensation act in order to reinstate benefits, should that possibility still exist. The overriding intent however is that the resolution of weekly benefits be swift.

Id. at 58.

Where an employee is capable of working, there must be a showing that the employee engaged in a reasonably diligent job search in order to prove entitlement to temporary wage loss benefits. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). Although he imposed restrictions on the employee, Dr. Larry McCallum, the employee's treating chiropractor, released the employee to light-duty work within these restrictions. The record indicates that since the layoff, the employee did work briefly in a temporary service and was working as a waiter at the time of the hearing. Consequently, the employee must make a showing of a reasonably diligent job search in order to prove entitlement to wage loss benefits. Analogous to the situation in Meline, to require the employer and insurer to serve another NOID, based on the lack of a job search, and relitigate on that issue would run counter to the goal of "the expeditious resolution of weekly benefit issues." Moreover, pursuant to Minn. Stat. § 176.238, subd. 6, it would have been within the compensation judge's discretion to allow additional evidence as was required to determine that issue.

Consequently, we vacate the compensation judge's award and remand this matter for further hearing on the issue of diligent job search. In so doing, we determine only that

evidence should have been taken and findings made with regard to the job search issue and we make no finding as to the excluded issues of the extent of permanent partial disability and wage rate.