LEAH EMMANS, Employee, v. WEST PUBLISHING CORP. and SAFECO INS. COS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
SEPTEMBER 21, 1999

No. [REDACTED SSN]

HEADNOTES

TEMPORARY TOTAL DISABILITY - MEDICALLY UNABLE TO CONTINUE; STATUES CONSTRUED - MINN. STAT. § 176.101, SUBD. 3j. The applicability of Minn. Stat. § 176.101, subd. 3j, is triggered not by the mere imposition of increased restrictions but by an actual worsening or disruption of the employee's underlying work-related condition. In this case there had been no worsening in the employee's medical condition since she reached MMI, and the employee's new written restrictions, without evidence of a change in her condition or even of any restriction from the work that she had been doing, which was no longer available to her, did not constitute a medical inability to continue work as is contemplated by Minn. Stat. § 176.101, subd. 3j.

ECONOMIC RECOVERY COMPENSATION; STATUES CONSTRUED - MINN. STAT. § 176.101, SUBD. 3t(b). Where the employee had not become medically unable to continue working as contemplated by Minn. Stat. § 176.101, subd. 3j, and where there was no evidence that the employee had received any payment of temporary total disability compensation, the compensation judge's award of twenty-six weeks of economic recovery compensation under Minn. Stat. § 176.101, subd. 3t(b) was reversed.

Reversed.

Determined by: Pederson, J., Rykken, J., and Johnson, J.
Compensation Judge: Joan G. Hallock.

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's award of temporary total disability benefits more than ninety days post maximum medical improvement pursuant to Minn. Stat. § 176.101, subd. 3j, and a consequent award of twenty-six weeks of economic recovery compensation pursuant to Minn. Stat. § 176.101, subd. 3t(b). We reverse.

BACKGROUND

On July 27, 1995, Leah Emmans [the employee] sustained a bilateral upper

extremity injury in the nature of a myofascial disorder while employed as a reference attorney for West Publishing Corporation [the employer], having been employed in that capacity since May of 1994. On the date of the employee's injury, the employer was insured for workers' compensation liability by Safeco Insurance Companies [the insurer]. The employer and insurer admitted liability for the employee's injuries and paid medical expenses on her behalf.

The employee's job as a reference attorney entailed day-long use of a computer keyboard to perform computer research. On September 25, 1995, the employee reported to the employer's Employee Health Service with pain in both hands and wrists that radiated up into her forearms. She informed the company nurse that she had previously noted improvement on weekends but was now experiencing aching that continued on through Monday. The employee's work station was evaluated and certain modifications were made. The following day, on September 26, 1995, the employee was seen by Dr. Julia Halberg of United Occupational Health, who diagnosed a bilateral wrist tendinitis with secondary forearm strain. Dr. Halberg prescribed physical therapy and limited the employee's data entry to from four to six hours maximum per day as tolerated. The employee received therapy at Spectrum Therapy Centers from October 2 through October 30, 1995. When she saw Dr. Halberg again on October 17, 1995, the employee reported no significant improvement and only temporary relief as a result of the therapy. The doctor elected to continue physical therapy and to reduce the employee's data entry work to a maximum of four hours per day.

On November 13, 1995, the employee was seen in consultation by Dr. Charles J. MacDonald at Metropolitan Hand Surgery Associates. Dr. MacDonald suspected an inflammatory condition and referred the employee for additional physical therapy through his clinic. He recommended that she continue "her present altered work activities." On December 4, 1995, Dr. MacDonald recommended that the employee refrain from performing any computer activities for two weeks. This restriction against data entry work was ultimately continued through early March 1996, and the employee never again returned to her full-time duties as a reference attorney. She did, however, continue to perform alternative light duty work in the form of "special projects" still under the supervision of a team coordinator in the reference attorney department, missing no work as a result of her restrictions. In the course of that period of alternative duty work, on February 22, 1996, Dr. MacDonald requested a second opinion from his associate, Dr. Melissa Barton. The employee described her symptoms to Dr. Barton "as being worse after she types or while she is typing. She feels better when she has been off typing for a week but when she starts back again she gets the same symptoms." The doctor concluded that the employee's exam results and history were consistent with a myofascial-type pain syndrome.

On March 5, 1996, the employee began seeing Dr. Lilly Ramphal, an associate of Dr. Halberg. Dr. Ramphal recommended a rheumatoid work-up, prescribed Relafen, limited the employee's keyboarding to no more than one hour per day, and restricted her from doing any extremely heavy grasping with the right hand. The employer attempted to comply with these restrictions. Two days later the employee was examined by orthopedist Dr. J. Craig Paulson at the request of her attorney. Dr. Paulson diagnosed focal dystonia, a muscular problem brought on by the employee's work activities. He recommended a neurologic evaluation and EMG, a

reduction in the amount of keyboarding, and improving the ergonomic quality of her work station.

On April 9, 1996, the employee reported to Dr. Ramphal that she was experiencing an achiness in her hands and wrists with keyboarding for even just one hour out of the day. Rheumatoid arthritis had been ruled out, and the doctor referred her for four additional physical therapy sessions at Spectrum. The doctor also visited the employee's work station and adjusted the keyboard. On April 23, 1996, the employee advised Dr. Ramphal that she had completed her physical therapy sessions but that her symptoms remained unchanged. Considering the possibility of carpal tunnel syndrome, the doctor referred the employee for a bilateral EMG. The test was conducted on April 29, 1996, and was interpreted as normal. When she saw Dr. Ramphal again on May 7, 1996, the employee informed the doctor that her symptoms were about the same and that she had been able to keyboard one hour per day. The doctor advised the employee "that we are running out of diagnostic possibilities here and that I am very near to deeming her at MMI." On May 28, 1996, Dr. Ramphal issued permanent restrictions against lifting or carrying in excess of fifty pounds, against pushing or pulling in excess of seventy-five pounds, and against keyboarding for more than one hour in an eight-hour shift. In a Health Care Provider Report, dated June 4, 1996, Dr. Ramphal opined that the employee had achieved maximum medical improvement [MMI] on May 28, 1996, with no permanent partial disability. The employee was served with Dr. Ramphal's opinion to that effect on June 11, 1996.

The employee's next medical appointment took place on February 25, 1997, with Dr. V. J. Eyunni, a colleague of Drs. Halberg and Ramphal. The employee saw Dr. Eyunni not because of an increase in symptoms but because the employer was in the process of offering her the position of client representative/legal specialist, which she was concerned might require more data entry than she was capable of. Dr. Eyunni reviewed the written description of the job and observed someone performing it. The doctor felt the job would be appropriate if modified to exclude the taking of incoming telephone calls, and the job thus modified was offered to the employee on March 14, 1997. The employee continued, however, to express concerns about the amount of data entry involved in the job, and she subsequently conferred again with Dr. Eyunni and the employer's representative, Linda Seibel. On April 8, 1997, Dr. Eyunni reported as follows:

> Linda had looked at the job that was offered and after further evaluation it was felt that the restrictions that she was on, one hour of data entry, would be very close and at times, if the job involved more time on the telephone, that actual data entry might be close to one hour or maybe even slightly more. Therefore, at this point, Linda felt that the job will be held back until further evaluation is done regarding restrictions.

As a result of the meeting on April 8, 1997, it was decided that the employee would be referred for a functional capacities evaluation [FCE] to further clarify her restrictions. It appears evident from testimony that, once this decision was made to refer the employee for the FCE, the employer never renewed its client representative/legal specialist job offer, nor did it

identify any other appropriate position within the employee's restrictions. The FCE was performed at Metropolitan Hand Therapy and Rehabilitation on May 8 and 21, 1997. The evaluator recommended that the employee avoid computer keyboard activities lasting more than five to ten minutes every hour. On July 1, 1997, Dr. Eyunni reviewed the FCE with the employee and, noting that she had "significant restrictions in doing repetitive work, particularly data entry," informed her "that at this point, it appears as though she will be on permanent restrictions." On July 16, 1997, Dr. Eyunni reported to the employer that, based on the FCE, he would recommend that data entry restrictions be applied on a permanent basis. In a note on August 1, 1997, the doctor recommended that the employee's data entry be restricted to a maximum of eighty minutes a day and no more than ten minutes an hour. On August 4, 1997, the employee met with representatives of the employer and was advised that, based on her permanent restrictions, she was being terminated because she was unable to perform the essential functions of the Westlaw reference attorney position, with or without reasonable accommodation.

After her termination, the employee searched for alternative employment. On October 10, 1997, she received an offer for a position as assistant county attorney in Washington County, to to commence on November 3, 1997. The employee provisionally accepted this position, but before beginning the job she accepted a different offer from the Sherburne County Attorney's Office, to begin on November 17, 1997, at a wage in excess of her earnings with the employer.

Following her termination on August 8, 1997, the employee sought no additional medical treatment until she saw Dr. Paulson again on November 9, 1998. The employee advised Dr. Paulson that her keyboarding activities at her current job represent less than one hour a day, even on busy days. Nevertheless, she reported that her symptoms persisted and that she still had pain that radiated to the dorsum of both hands. The doctor recommended a trial injection of Celestone and Xylocaine to the right wrist.

On August 13, 1997, the employee filed a Claim Petition, alleging entitlement to compensation for temporary total disability continuing from August 11, 1997, and to twenty-six weeks of economic recovery compensation [ERC], pursuant to Minn. Stat. § 176.101, subd. 3t(b). The employee also sought penalties pursuant to Minn. Stat. § 176.225. The employer and insurer filed an Answer on August 26, 1997, contending that temporary total disability benefits were not payable, as the employee was more than ninety days post MMI. The employer and insurer further denied liability for ERC and penalties.

The claim came on for a hearing before Compensation Judge Joan G. Hallock on December 11, 1998. At the hearing, the employer's human resource manager, Jeff Henry, testified that the employee was terminated from her reference attorney position in part because "[w]e just ran out of light duty work"; "[w]e couldn't continue to provide the modified duty." In her Findings and Order issued on February 4, 1999, the compensation judge determined that the employee became medically unable to continue working as of August 11, 1997, and was therefore entitled to temporary total disability benefits from August 11, 1997, through November 3, 1997, the date the employee could have been working at Washington County. She also awarded twenty-

six weeks of ERC pursuant to Minn. Stat. § 176.101, subd. 3t(b). The employee's claim for penalties was denied. The employer and insurer appeal.

STANDARD OF REVIEW

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

Medically Unable to Continue Working

At unappealed Finding 19, the compensation judge established that Dr. Ramphal found MMI to have occurred on May 28, 1996. The parties stipulated at hearing that the employee was served with Dr. Ramphal's opinion to this effect on June 11, 1996. Minn. Stat. § 176.101, subd. 3e(a) (repealed 1995), provides that an employee's temporary total compensation shall cease ninety days after service of a medical report indicating the employee has reached MMI. In a separate finding, the judge determined that the employee became "medically unable to continue working" as of August 11, 1997. Minn. Stat. § 176.101, subd. 3j (repealed 1995), provides for renewed eligibility for temporary total compensation beyond 90 days post MMI if the employee is "medically unable to continue" working as a result of a work-related injury. See also O'Mara v. State of Minn./Univ. of Minn., 501 N.W.2d 603, 48 W.C.D. 483 (Minn. 1993), and Wills v. Kratz Farm, 509 N.W.2d 162, 49 W.C.D. 417 (Minn. 1993). In the present case, the compensation judge reasoned that, upon Dr. Eyunni's adoption of the FCE conclusions as permanent, the employer could no longer accommodate the employee's restrictions. Because the employee's new restrictions were thus the sole reason for her termination, these restrictions "changed her ability to work" and became the triggering factor in making her medically unable to continue working.

On appeal, the employer and insurer argue that the compensation judge committed an error of law in applying Minn. Stat. § 176.101, subd. 3j,[1] to the facts of this case. They contend

[1] Minn. Stat. § 176.101, subd. 3j (1986), provides as follows:

> **Medically unable to continue work**. (a) If the employee has started the job offered under subdivision 3e and is medically unable to continue at that job because of the injury, that employee shall receive temporary total compensation pursuant to clause (b). In addition, the employer who was the employer at the time of the injury shall provide rehabilitation consultation by a qualified rehabilitation consultant. Further rehabilitation, if deemed appropriate, is governed by section 176.102.

that the only reason the employee did not continue working for the employer was the unavailability of work and not a change in the employee's medical condition that prevented her from performing the duties of the job she held at the time of her termination. We agree.

The employer and insurer contend that the present case is factually similar to Piere v. 3M, 55 W.C.D. 470 (W.C.C.A. 1996), in which this court distinguished between a medical inability to work and a non-medical inability to work. Ms. Piere had suffered an upper back injury that prevented her from returning to her former job. She was provided alternative work within her restrictions that lasted a number of months. As a result of a corporate restructuring plan, Ms. Piere and a number of co-workers were laid off. There were other jobs available at the employer which Ms. Piere was qualified to perform by reason of experience and seniority, but her work-related disability precluded her from working into any of them. Ms. Piere argued that she was entitled to recommencement of temporary total compensation under subdivision 3j, as her inability to work following her layoff was more closely related to a medical inability to continue to work than to a layoff because of economic conditions. See also Maktari v. Ford Motor Co., 481 N.W.2d 44, 46 W.C.D. 208 (Minn. 1992). This court held that there was no change in the employee's ability to work medically and that, since subdivision 3j contemplates recommencement precipitated by a medical inability to work, the facts leading to Ms. Piere's unemployment did not legally constitute being "medically unable to continue" to work as that phrase was intended by the legislature.

The employee contends that Piere is clearly distinguishable from the present case, in that the employee here lost her job not because of any layoff or corporate restructuring but because the employer could not accommodate the permanent restrictions assigned her in August of 1997. This, they argue, is the exact scenario contemplated by subdivision 3j. While we are sympathetic to the employee's argument, we find the distinction to be legally insignificant. Regardless of whether an employee with permanent restrictions is unemployed because of an economic layoff or because of an employer's inability to offer work, the legal effect is the same if the employee is beyond ninety days post MMI. Additional compensation may be payable under subdivisions 3i and 3k but not under subdivision 3j.

It appears from several past decisions of this court and the supreme court, such as

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> (b) Temporary total compensation shall be paid for up to 90 days after the employee has reached maximum medical improvement or 90 days after the end of an approved retraining plan, whichever is later. The temporary total compensation shall cease at any time within the 90-day period that the employee begins work meeting the requirements of subdivision 3e or 3f. If no job is offered to the employee by the end of this 90-day period, the employee shall receive economic recovery compensation pursuant to this section but reduced by the impairment compensation previously received by the employee for the same disability.

those cited above, that in cases where 3j benefits are awarded the employee's inability to continue working is preceded and compelled by a clear deterioration in the employee's work injury-related symptomology. See O'Mara, 501 N.W.2d at 606, 48 W.C.D. at 487 ("[h]istorically, Minnesota's Workers' Compensation Act has always provided support for occupationally disabled workers during periods of actual medical inability to work" (emphasis added)); see also, e.g., Sabby v. Copasan, Inc., 462 N.W.2d 603, 43 W.C.D. 509 (Minn. 1990); Trojanowski v. Primnet Data Sys., 56 W.C.D. 271 (W.C.C.A. 1997); Cady v. Old Dutch Foods, slip op. (W.C.C.A. July 10, 1998); Iversen v. R & D Copier Supply, 43 W.C.D. 612 (W.C.C.A. 1990). In virtually all of these cases, some change occurred in the employee's medical condition that required payment of a new period of temporary total disability benefits, pending the employee's attainment once again of the level of stability that ordinarily characterizes MMI. This is not to suggest that the change in the employee's condition need be followed by a surgical procedure, as was the case in Sabby, O'Mara, and Wills. Nor need that change cause a substantial loss of time from work, see Trojanowski, or be supported by "objective medical documentation," see Cady.

In the present case, it is clear that the employee was physically precluded from performing her pre-injury tasks as a Westlaw reference attorney under either the permanent restrictions offered on May 28, 1996, or the permanent restrictions issued pursuant to the May 1997 FCE. However, it was not the employee's pre-injury job but her post-injury "special projects" job that was the subject of review on the date of her termination. The employee had been physically capable of performing that job under her May 1996 restrictions and she continued to be physically capable of performing that job under the restrictions issued pursuant to her May 1997 FCE. Indeed, the employee herself agreed that she would have been physically able to continue performing that work following the date of her termination. However, according to the testimony of the employer's human resource manager, that work was no longer available at the time of her termination: "We just ran out of light duty work." It may well be true that the setting of physical restrictions may affect the nature of post-injury work that an employee seeks and that an employer will offer. However, we cannot agree that, once the employee is actually at work in a post-injury job, a mere pronouncement of altered restrictions by itself, absent some worsening in the employee's physical symptomology, necessarily changes an employee's actual ability to continue working such as is contemplated under subdivision 3j. In the present case, there is no contention that the employee's condition had in any way worsened since she reached MMI originally in June 11, 1996, nor is there any contention that her original MMI status was in any way altered by her changed restrictions or her termination. Moreover, at the time of her termination, the employee was not disqualified even by her new written restrictions from performing the "special projects" job that she had been doing. As this court stated in Michalski v. Pepsi Cola Bottling Co., 55 W.C.D. 423, 428 (W.C.C.A. 1996),

> [u]nlike the inability to continue situations, where temporary total benefits, once revived, again terminate[] on attainment of MMI from the condition causing the inability to continue, a revival of temporary total whenever an employee was not offered a post-injury job by the employer, would presumably, continue without limitation indefinitely. To do so would, presumably, render the statutory

provisions terminating temporary total disability 90 days after MMI virtually meaningless.

We acknowledge that it was clearly the employee's medical restrictions that precipitated her termination by the employer and that she was not terminated because of any new economic circumstances[2] or performance issues. Moreover, one can certainly envision a variation in the facts that might have resulted in the employee's becoming "medically unable to continue" working as contemplated by the statute. The employee might well have been entitled to benefits under the statute, for instance, had she actually commenced the more productive position offered to her just prior to her FCE and subsequently had worsening in symptomology related to her work injury. Or, for instance, she might even have been entitled to benefits had her written restrictions remained unchanged but her actual physical symptomology increased as a result of her performance of the "special projects" job. Neither of these circumstances, however, was here the case.

It appears that one of the legislature's goals in its scheme of compartmentalizing work-related injuries, a scheme that included the enactment of subdivision 3j, was the elimination of the open-ended nature of temporary total disability benefits and of temporary partial disability benefits payable at the rate of temporary total disability benefits. We conclude that the statute provides for reinstatement of temporary total disability benefits only where an actual disturbance in the employee's work-related condition causes an actual physical inability to work at the job that the employee has been doing. To hold otherwise would essentially render meaningless the statutory provisions terminating temporary total disability compensation ninety days after MMI. It is not the mere imposition of restrictions, such as occurred in the present case, that triggers the applicability of subdivision 3j, but an actual worsening or disruption of the employee's underlying work-related condition. In this case, the employee reached MMI on June 11, 1996, and there has been no worsening in her medical condition since that time. Nothing has occurred that would give rise to a new determination of MMI or recommencement of temporary total disability benefits. Accordingly, we reverse the compensation judge's award of temporary total disability benefits.

Application of Minn. Stat. § 176.101, subd. 3t(b)

The parties agree that the employee sustained an injury which precluded her from returning to her pre-injury job and which produced no permanent partial disability covered by the permanent partial disability schedules. They further agree that entitlement to twenty-six weeks of ERC under Minn. Stat. § 176.101, subd. 3t(b),[3] is conditioned upon an employee's receipt of temporary total disability benefits. Because we have determined that the employee did not

[2] The "special projects" jobs that the employee had been doing appear to have been temporary "make-work" tasks given to the employee while the employer sought a more productive position for the employee within her restrictions.

[3] Repealed effective October 1, 1995.

become medically unable to continue working as contemplated by subdivision 3j, and because there is no evidence that the employee received any payment of temporary total disability compensation, we reverse the judge's award of twenty-six weeks of ERC. See Kilness v. S.B. Foot Tanning Co., slip op. (W.C.C.A. June 10, 1992).