

SHAMSO M. FARAH, Employee/Appellant, v. HEARTLAND FOODS, SELF-INSURED/COMPCOST, INC., Employer, and MINNEAPOLIS ORTHOPAEDIC & ARTHRITIS INST. and CTR. FOR DIAGNOSTIC IMAGING, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 23, 1999

No.[REDACTED SSN]

HEADNOTES

JOB SEARCH - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's job logs and lay testimony, supported the compensation judge's finding that she had failed to perform a reasonably diligent search for employment, and supported the consequent denial of temporary total disability compensation of the period claimed.

PRACTICE & PROCEDURE - ADEQUACY OF FINDINGS; PRACTICE & PROCEDURE - REMAND. Where the court is unable to discern the basis and underlying findings on which the compensation judge's decision was predicated, a remand is necessary for more detailed findings and an explanation of the legal basis for the decision before this court can review the specific issues affected.

Affirmed in part and remanded in part.

Determined by Johnson, J., Rykken, J., and Wheeler, C.J.
Compensation Judge: James R. Otto

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the denial of temporary total and temporary partial disability compensation through the date of hearing, and from the denial of her request for a rehabilitation consultation. We affirm the denial of temporary total benefits but remand the claims for temporary partial disability benefits and a rehabilitation consultation for further findings in accordance with this opinion.

BACKGROUND

The employee, Shamsso M. Farah, was born in Somalia in May 1971 and came to the United States in 1997. In early October 1997 she began working for the employer, Heartland Foods as a rotomatic operator in the employer's chicken packaging facility. She sustained an admitted work injury to the left shoulder on April 29, 1998 while working for the employer. The employee's weekly wage at the time of the injury was \$397.45. (T. 27-31; Stipulation 1;

Judgment Roll: First Report of Injury.)

Immediately following the injury the employee's supervisor assigned her to light-duty work. The employee continued her regular schedule with the employer without loss of time or earnings. (T. 136-137.)

The employee was seen for her work injury by an osteopath, Dr. J. K. Willett, D.O., on May 4, 1998 at the Affiliated Medical Centers, P.A. Dr. Willett diagnosed a strain of the left shoulder. He released her to work with temporary restrictions on lifting or carrying over ten pounds and on the use of the left shoulder in grasping or gripping, repetitive motions or operation of machinery or vibrating tools. (Exh. C: 5/4/98 chart note, 5/4/98 release to work form.)

The employee returned to the Affiliated Medical Centers on June 16, 1998 for further evaluation of her left shoulder injury. She was seen by Dr. L.A. Lynner, M.D. On examination, the employee's left shoulder was without obvious swelling or erythema but was tender to the touch over the deltoid area anteriorly. Shoulder range of motion was full but with pain at the higher degrees of rotation. Grip strength was full and the drop test for rotator cuff tear was negative. Dr. Lynner diagnosed a residual left shoulder strain, but also suspected an underlying tendinitis without severe rotator cuff injury. She imposed temporary work restrictions similar to those put in force by Dr. Willett, and noted that if the employee had not improved after that time, she would need to consider x-ray studies and physical therapy treatment. (Exh. C: 6/16/98 chart note, 6/16/98 physician report form.)

Throughout the period following the injury, the employee's supervisor followed the medical restrictions and continued the employee on light-duty work. (T. 138-142.)

On June 18, 1998, the employee was involved in a physical altercation with another employee in the women's bathroom at work. She was placed on suspension while management investigated the incident, and on June 23, 1998 the employee was terminated for fighting on company property in violation of the employer's published work rules. (T. 34-35, 115-120; Exhs. 7-11.)

After her termination the employee relocated to Minneapolis where she testified she had relatives and would seek further medical attention. The employee was seen by Dr. Douglas A. Becker, M.D., at the Minneapolis Orthopaedic and Arthritis Institute on July 6, 1998. Dr. Becker noted severe subacromial crepitus and tenderness in the left shoulder with a positive impingement sign. His impression was of a left shoulder rotator cuff tendinitis. He recommended an MRI scan of the left shoulder and restricted the employee from repetitive or overhead use of the left arm and from lifting over five pounds with the left arm. (T. 36, 43; Exh. A: 7/6/98 chart note & rtw form).

On July 6, 1998 the employee filed a claim petition seeking temporary total disability from June 20, 1998, a rehabilitation consultation, with a claim for temporary partial and

permanent partial disability to be determined. (Judgment Roll.).

The MRI scan performed on July 8, 1998 revealed a mild intrasubstance tendinosis involving the subscapularis and supraspinatus tendon fibers as well as mild AC joint arthrosis. Dr. Becker discussed the results of the MRI scan with the employee on July 13, 1998. He recommended that the employee consider left shoulder arthroscopic decompression surgery. (Exh. A: 7/8/98, 7/13/98; Exh. B.)

The employee first began looking for other work beginning in mid-July 1998. She introduced into evidence at the hearing some business cards and other materials purporting to document contacts with six prospective employers, and testified that she had contacted from six to eight more that were not documented. She testified that her lack of English language skills made it impossible for her to look for jobs through newspaper advertisements or to fill out job applications without assistance. The employee ultimately found full-time employment, with frequent overtime, as a housekeeper at the Minneapolis Marriott on October 12, 1998 at \$7.00 per hour. Her weekly earnings in this job have varied, averaging about \$320.00 per week. She testified that she has been able to observe Dr. Becker's restrictions on the use of her left arm while performing this work. (T. 41-46, 80; Exhs. G, H.)

The employee continued to return to Dr. Becker periodically through April 28, 1999 and Dr. Becker noted that she remained extremely symptomatic. He continued to recommend that she undergo arthroscopic surgery. As of April 28, 1999 the employee had not decided whether to undergo the procedure. The employee remained under Dr. Becker's work restrictions during this period and through the date of hearing on June 10, 1999. (Exh. A.)

A hearing was held on the issues raised by the employee's claim petition on June 10, 1999 before a compensation judge of the Office of Administrative Hearings. Following the hearing, the judge denied temporary total and temporary partial disability compensation and the rehabilitation consultation. The employee appeals.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

Temporary Total Disability

The employee first argues that the compensation judge's finding that the employee was terminated for misconduct unrelated to the personal injury is not supported by substantial evidence. We need not address this issue because it is not determinative of the employee's claim for benefits in this case.¹

Where an employee is terminated for misconduct, benefit entitlement is suspended until it becomes demonstrable that the employee's work-related disability is the cause of an inability to find new employment. This determination is made "upon consideration of the totality of the circumstances, including the usual work search requirements." Marsolek v. George A. Hormel & Co., 438 N.W.2d 922, 924, 41 W.C.D. 964, 968 (Minn. 1989). An employee is totally disabled if unable to find or hold employment caused or substantially contributed to by the personal injury. Schulte v. C.H. Peterson Constr. Co., 278 Minn. 79, 153 N.W.2d 130, 24 W.C.D. 290 (1967). "The injured employee proves total disability by showing that work the employee is capable of doing is unavailable, and unavailability is shown by a diligent job search to no avail." Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 733, 40 W.C.D. 948, 954 (Minn. 1989). Therefore, the issue on appeal is whether the determination that the employee failed to conduct a reasonable and diligent job search is supported by substantial evidence, not whether she was terminated for misconduct.

The burden of proving an adequate job search is on the employee. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 40 W.C.D. 948 (Minn. 1988). The determination of whether or not an employee's job search is diligent is a question of fact for the compensation judge to resolve. Bauer v. Winco/Energex, 42 W.C.D. 762, 768 (W.C.C.A. 1989). Moreover, while the issue of whether or not an employee has sought work with reasonable diligence must be viewed within the context of the scope of rehabilitation assistance which has been provided by the employer and insurer, it has been held that the absence of rehabilitation assistance does not make a virtual lack of any job search sufficient. See Evink v. Roger E. Duncan, slip op. (W.C.C.A. May 17, 1991). While the employee's job search efforts should be weighed in the context of a lack of rehabilitation assistance, the absence of rehabilitation services did not relieve the employee of her obligation to diligently seek employment. Stephens-Hahn v. Lakeland Envelope Co., slip op. (W.C.C.A. July 30, 1992).

¹ The employer and insurer conceded, both in their brief and at oral argument before this court, both that this case is not governed by Minn. Stat. §176.101, subd. 1e(1), and that the employee's termination for misconduct is not a bar to subsequent benefit eligibility. See Resp. Brief at 14.

In the instant case the employee's testimony and job logs reveal that she contacted at most 14 potential employers during the roughly three and one-half month period between her termination from the employer and the date she found work at the Minneapolis Marriott. While we recognize that the employee's language skills and other factors made her job search more difficult, we cannot conclude that the compensation judge clearly erred in determining that this level of job search effort, one contact per week, was insufficiently diligent to establish entitlement to temporary total disability benefits for the period claimed.

Temporary Partial Disability

The employee eventually found full-time work from October 12, 1998 at the Minneapolis Marriott, at a wage loss. The compensation judge, however, denied temporary partial disability compensation for the period from October 12, 1998 through the date of hearing.

In order to be eligible for temporary partial benefits, the employee must demonstrate a work-related physical disability, an ability to work subject to the disability, and an actual loss of earning capacity causally related to the disability. Dorn v. A. J. Chromy Constr. Co., 310 Minn. 42, 245 N.W.2d 451, 29 W.C.D. 86 (1976); see also Arouni v. Kelleher Constr., Inc., 426 N.W.2d 860, 41 W.C.D. 42 (Minn. 1988).

The employee argues that the compensation judge improperly based his decision on the finding that the employee's wage loss was "directly due to her misconduct and not to her injury." (Finding 4.) She contends that her post-injury earnings in the job at Minneapolis Marriott raise a rebuttable presumption of a loss of earning capacity, and that the compensation judge improperly failed to apply the presumption, apparently reasoning that the employee would still have been able to work for the employer in her light-duty post-injury job at full wages but for the termination resulting from her misconduct, essentially accepting the employee's post-injury wages in the light-duty job with the employer as an accurate reflection of the employee's post-termination earning capacity despite the termination of that employment when the employee was fired for alleged misconduct.

It is clear from the record that at the hearing below the parties focused heavily on the employee's alleged misconduct. The compensation judge made various findings which could suggest that the denial of temporary partial disability compensation benefits was in fact predicated upon the reasoning complained of by the employee.

On the other hand, there are also some portions of the findings and memorandum which seem to suggest that the denial of temporary partial disability compensation may have been predicated upon a finding that the employee was no longer subject to medical restrictions after June 30, 1998, consistent with the opinion of Dr. Mark E. Friedland, M.D., who examined the employee on behalf of the employer and insurer. (Compare Finding 5 with Exh. 3 at 4.) The import of Finding 5 is unclear, however, and we note further that in other matters, particularly the question of whether the employee had reached maximum medical improvement and whether proposed surgical treatment was reasonable and necessary, the compensation judge expressly

adopted the opinions of Dr. Becker over those of Dr. Friedland.

The compensation judge's Findings, Order and Memorandum are insufficiently clear and unambiguous for us to determine the basis for the denial of temporary partial disability compensation or the specific underlying findings on which that determination rested. We therefore remand the issue of temporary partial disability compensation to the compensation judge for specific findings on the nature and extent of the employee's disability, medical restrictions and earning capacity, as well as for a discussion of the legal basis for the compensation judge's decision.²

Rehabilitation Consultation

The compensation judge denied the employee's request for a rehabilitation consultation. The basis for the denial is not set forth in the compensation judge's memorandum and, as in the case of temporary partial disability, we cannot discern from the Findings and Order what specific findings may have been related to the judge's determination on this issue. We therefore remand the question of entitlement to a rehabilitation consultation. The compensation judge should clarify the legal basis for whatever decision he makes and set out with specificity those findings which support the decision.

² We must note that we agree with the employee's position that if the employee was subject to restrictions her work for Marriott is clearly substantial enough to warrant application of the presumption that her wages there are equivalent to her earning capacity. The theory that there would be no wage loss if the employee had not engaged in misconduct is spurious. The misconduct, even if true, does not play a part in a temporary partial analysis.