MYRNA J. GILES, Employee, v. STATE, DEP'T OF TRANSP., SELF-INSURED, Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 6, 1999

No.[REDACTED SSN]

HEADNOTES

WITHDRAWAL FROM LABOR MARKET - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee did not withdraw from the labor market by moving from the Twin Cities to Albert Lea where the employee obtained employment within two months after moving to Albert Lea, has maintained employment since, and cooperated with rehabilitation services in conducting a job search.

EARNING CAPACITY - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's determination that the employee's post-layoff earnings in Albert Lea are an accurate reflection of her present earning capacity where the sole evidence rebutting the employee's claim was evidence of jobs available in the metropolitan area prior to her move to Albert Lea.

Affirmed.

Determined by Johnson, J., Wheeler, J., and Wilson, J.
Compensation Judge: Kathleen Nicol Behounek

OPINION

THOMAS L. JOHNSON, Judge

The self-insured employer appeals from the compensation judge's finding that the employee proved a loss of earning capacity causally related to her personal injury and from the judge's consequent award of temporary partial disability benefits. We affirm.

BACKGROUND

Myrna Giles, the employee, injured her back on January 27, 1988, while working for the self-insured employer, Minnesota Department of Transportation. The employee was paid $10.92 an hour and her weekly wage was $436.80. The self-insured employer accepted liability for the employee's personal injury. The employee suffers from degenerative disc disease of the lumbar spine as a result of her work injury. She has permanent restrictions on her work activities which preclude her return to her pre-injury job as a highway maintenance worker. In 1989, the parties settled the employee's claim for a 10.5 percent whole body disability. An award on

stipulation was filed on December 7, 1989.

The employee was born and raised in Albert Lea, Minnesota. She is currently 62 years of age. She attended Mankato State University and graduated with a degree in music education in 1967. (T. 16.) Some time thereafter, she completed a course in offset printing at Austin Community College. (T. 17.) The employee has a varied work history. After graduation from college, she worked as a music teacher in Elkton and New Richland, Minnesota, from 1968 through 1972. (T. 19-20.) Between 1973 and 1975 the employee worked for the State of Minnesota, Department of Welfare. (T. 20.) The employee did not work from 1975 through 1979. From 1979 through 1981 she was the dog catcher for the City of Albert Lea. In 1981, the employee went to work for Brown Printing in Waseca, Minnesota. The employee injured her right shoulder after two days and did not return to work at Brown. (T. 21.) From 1982 through 1984 the employee worked for Rehbein Construction Company. The first summer she worked in St. Paul, Minnesota, and the second in Montana. (T. 21-22.) From 1985 to 1986, the employee worked part-time at Naeve Hospital in Albert Lea, Minnesota, as a home health care aide. (T. 22.) On November 12, 1986, the employee was hired as a highway maintenance worker by the employer where she worked until her injury on January 27, 1988. (T. 23.)

The employee was unable to return to her job as a maintenance worker after her work injury. The employer initially transferred the employee to its offices in Owatonna, Minnesota, where she performed light-duty clerical work. Several months later, the employee was transferred to the Department of Finance in St. Paul, Minnesota. She worked as a clerk for the department from approximately November 1988 through November 1995. It is undisputed the clerk job was within the employee's physical restrictions. The employee's earnings with the Department of Finance exceeded her pre-injury wage. (T. 108-109.) During this period, the employee commuted from her home in Nerstrand, Minnesota, to her office in St. Paul, a trip of approximately 45 minutes. (T. 26.) The employee also owned a house in Albert Lea, Minnesota, which she rented to tenants. (T. 15.)

In early September 1995, the Department of Finance notified the employee she would be laid off effective November 11, 1995. The employee was formally advised by the State of Minnesota Department of Finance of the layoff by letter dated October 11, 1995. The letter further explained the employee's rights to "claim" vacant positions in other state agencies. (Resp. Ex. 3.) The letter stated, in part:

> Article 15 of the AFSCME, Council 6, Bargaining Agreement, describes the procedures for handling layoffs. Of the options described in Article 15, none within our department are available to you at this time. Unless circumstances change your layoff will be effective the close of the workday November 14, 1995. The length of the layoff is indefinite.
>
> As an employee facing layoff, you have the right to "claim" vacant positions at an equal or lower level in other state agencies for which

> you are determined to be qualified. You can schedule advisory testing through me or the Department of Employee Relations in order to determine if you are qualified for any positions that may be available. I have requested a list of open requisitions from the Department of Employee Relations so you will have the opportunity to claim any positions that may be available. I should receive the first list on Monday or Tuesday of next week.

The employee acknowledged she was aware of her claiming rights under the union contract. (T. 58-59.)

Deb Patrin, a personnel executive with the Department of Finance, testified at the hearing.[1] Her job duties included assisting employees with transitions to new jobs after layoffs. Ms. Patrin began working with the employee before her November 11, 1995 layoff. Ms. Patrin personally met with the employee to explain the claiming process. Ms. Patrin reviewed available job openings with the employee and provided the employee with a list of open positions once a week. Ms. Patrin testified that when notified of the layoff, in October 1995, the employee told Ms. Patrin she was not interested in positions in the Twin Cities even if one was available to her. The employee told Ms. Patrin she wanted to look for jobs in southern Minnesota. There were, however, no jobs available with the State in southern Minnesota during the time the employee had claiming rights. Ms. Patrin further testified that although the employee was advised of specific jobs in the Twin Cities area, she did not claim any of them.

The employee acknowledged she signed Respondent Exhibit 4 entitled Layoff/Re-employment List & MCO Bulletin Subscription Request prepared by the Minnesota Department of Employee Relations (DOER). (T. 60.)[2] The employee requested her name be placed on the "layoff list for the seniority unit, class/option location and employment condition from which you are laid off" and "other layoff and re-employment lists for which you may be eligible." The employee indicated she was willing to work in Albert Lea, Austin, Faribault, and Owatonna, but did not include the Twin Cities and suburban area. The employee testified that by the time she received the layoff notice on October 11, 1995, she had decided to seek employment only in southern Minnesota. The employee acknowledged she did not claim any job available in the

[1] The trial testimony of Ms. Patrin and Judy Schmidt was not tape-recorded by the compensation judge and does not, therefore, appear in the transcript of the hearing. By order dated May 7, 1998, this court ordered the record be supplemented by a statement of the proceedings prepared by the parties and approved by the compensation judge. Peter Pustorino, attorney for the employer and insurer, prepared two affidavits summarizing the testimony of Ms. Patrin and Ms. Schmidt. These affidavits constituting the supplemental statement of the proceedings were approved by the compensation judge as submitted.

[2] The document is undated, although a handwritten note at the top of the document states it was sent to DOER on 11/22/95.

metropolitan area during the period of time she was eligible to claim jobs. (T. 60-61.) She further acknowledged that by limiting her job search to southern Minnesota she was unavailable for the majority of state jobs that were available. (T. 164.)

Cynthia Storelee was the placement coordinator for DOER. Her job was to assist injured state employees in trying to secure employment within the State of Minnesota. Ms. Storelee was instrumental in assisting the employee in obtaining her position as a Clerk II with the Department of Finance after her 1988 injury. (T. 108.) Ms. Storelee testified the employee had a right to claim jobs with the State of Minnesota from the date she received the notice of layoff until the date she was actually laid off. The notice of the layoff was dated October 11, 1995. (T. 110; Ex. 3.) Ms. Storelee reviewed the records of the State of Minnesota and concluded there were ten vacancies in the metropolitan area between October 11 and November 11, 1995, the employee could have claimed. Each of these jobs paid the same wage the employee received at the Department of Finance. (T. 110-111.) After the employee's layoff on November 11, 1995, the employee remained on a seniority layoff list for the Department of Finance and a class layoff list. (See Ex. 4.) When a vacancy with the state occurs, Ms. Storelee testified the employer receives the layoff list containing the employee's name. Ms. Storelee noted the employee stated she was available to work only in Albert Lea, Austin, Faribault, and Owatonna. (T. 116-117.)

Shortly after the layoff, in December 1995, the employee sold her home in Nerstrand, Minnesota, moved to Mankato and enrolled in an independent-living program at Mankato State University. The employee received assistance from a dislocated workers' program through the State of Minnesota. She began this program during the winter quarter of 1995-96. The employee completed 26 credits and then discontinued the program after funding ran out from the dislocated workers' program. (T. 16-18.) In July 1996, the employee moved to Albert Lea and lived in the house she had formerly rented. (T. 48.) The employee spent approximately one month remodeling the home and then began a work search in southern Minnesota. On September 3, 1996, the employee obtained a full-time job with Morrin Homes, Inc., where she worked for approximately three months. In November 1996, the employee took a job at Rathjen House, a halfway house for mentally impaired persons in Albert Lea. In October of 1997, the employee accepted a second part-time job at Crest Homes. The employee's combined earnings from her jobs with Rathjen and Crest averaged approximately $275.00 per week during the last quarter of 1997. (Pet. Ex. P.)

Ronald Larsen, a qualified rehabilitation consultant, first met with the employee on April 4, 1996, at which time the employee was a full-time student at Mankato State University. The employer objected to rehabilitation services. In December 1996 rehabilitation services were ordered by the Department of Labor and Industry and the QRC prepared a job placement plan and agreement dated January 8, 1997. Mr. Larsen recommended job search in the Albert Lea area. Job placement services were initiated. By April 1997, the employee was working full-time and rehabilitation services were discontinued. (T. 83-87.) Mr. Larsen concluded the employee cooperated with rehabilitation services. (T. 91.) He opined the employee's earning capacity in the clerical and social service areas in the southern Minnesota labor market was $6.50 to 7.50 an hour, to start. In the metropolitan area, the same jobs would pay from 7.00 to $9.00 an hour. (T.

92-94.)

Jane Moncharsh, a qualified rehabilitation counselor, conducted an employment evaluation of the employee at the request of the employer. Ms. Moncharsh opined that jobs in southern Minnesota pay 20 to 30 percent less than comparable jobs in the metropolitan area. (T. 131-132.) She opined the employee's decision to work in the human services area limited her ability to find employment and her income. Ms. Moncharsh concluded the employee had numerous abilities, aptitudes, experiences and transferrable skills which would enable her to find work in administrative, clerical, teaching, and customer service positions. (T. 133-136.) The QRC testified the employee could have returned to work for the state after her layoff by the Department of Finance at no wage loss. However, by leaving state employment the employee made it more difficult to obtain a job with a comparable wage rate. (T. 140.) Ms. Moncharsh opined the employee's employment at Morrin Homes, Rathjen House and Crest Homes were not an accurate reflection of the employee's earning capacity. (T. 144.)

In January 1997, the employee filed a claim petition seeking temporary partial disability benefits from September 3, 1996. The self-insured employer denied liability and the case came on for hearing before a compensation judge of the Office of Administrative Hearings on January 6, 1998. In a Findings and Order served and filed February 20, 1998, the compensation judge found the employee unsuccessfully looked for positions which she could claim after her layoff by the Department of Finance, and found the employer had failed to make a job offer to the employee at that time. The compensation judge found the employee's move to Albert Lea, Minnesota was not a removal from the labor market so as to preclude her entitlement to workers' compensation benefits. Finally, the compensation judge found the employee sustained a loss of earning capacity secondary to her personal injury and found the employee's earnings accurately reflected her earning capacity. Based upon these findings, the judge ordered the self-insured employer to pay temporary partial disability benefits. The employer appeals.

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 record as submitted." Minn. Stat. § 176.421, subd. 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, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (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, 37 W.C.D. at 240. Similarly, "[f]actfindings are clearly erroneous only if the reviewing court on the entire evidence e 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). Findings of fact 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.

DECISION

Withdrawal from Labor Market

The appellant contends it does not owe temporary partial disability benefits because the employee's loss of earnings was due to her personal choice regarding her place of residence, and was not a result of her personal injury. This conclusion, the appellant asserts, is evidenced by the fact that ten jobs were available within the state system which the employee could have claimed before her layoff. Each of the ten jobs paid in excess of the employee's pre-injury wages so the employee could have worked in the metropolitan area at no wage loss. Accordingly, appellant asserts the employee failed to prove a causal connection between her personal injury and her wage loss. We disagree and affirm the award of temporary partial disability benefits.

In Paine v. Beek's Pizza, 323 N.W.2d 812, 35 W.C.D. 199 (Minn. 1982) the employee, after a personal injury, moved from the metropolitan area to northern Minnesota to an area where there were few, if any, employment opportunities available. The employee was unable to find work in his new community and sought temporary total disability benefits. The Supreme Court stated the record was "clear that where he chose to live the employee could obtain nothing other than sporadic, short-term employment resulting in grossly insubstantial income." Id. at 814, 35 W.C.D. at 203. The court noted an employee has the right to choose where he or she will live. But it does not follow that if an employee chooses to live in an area where "employment opportunities for him are virtually nonexistent, an employer-insurer must subsidize him by continued payment of total disability benefits." Id. at 815, 35 W.C.D. at 205. The court held that Paine voluntarily withdrew from the labor market and had not, therefore, made a "reasonably diligent effort"[3] to procure employment. See also Fredenburg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 260 (Minn. 1981).

The appellant argues that this case is similar to Paine, asserting the employee's reduction in earnings resulted not from her disability but from her personal decision to leave the Twin Cities area. The employer contends it should not be required to subsidize the employee's voluntary decision to leave the metropolitan area for a labor market where available jobs are fewer and wages are generally lower. This argument misstates the test for a geographic withdrawal from the labor market. Contrary to the appellant's argument, a voluntary move to an area of lesser employment opportunities and lower wages does not automatically constitute a withdrawal from the labor market. In Kurrell v. Nat'l Con Rod, Inc., 322 N.W.2d 199, 35 W.C.D. 76 (Minn. 1982) the Supreme Court held the test for a withdrawal from the labor market was not whether the employee's motivation in moving was personal. Rather, the appropriate standard is one which measures the employee's actions against the statutory objectives of reducing workers' compensation costs and at the same time improving the employee's standard of living. "It would be a harsh and rigid rule that allowed an employee to better her personal situation only at the

[3] See Minn. Stat. § 176.101, subd. 2 (1980).

expense of her statutory right to . . . benefits." Id. at 202, 35 W.C.D. at 80. In Hildebrandt v. Vickerman Constr. Co., 55 W.C.D. 112 (W.C.C.A. 1996) summarily aff'd (August 23, 1996) this court held, "In determining if an employee has voluntarily withdrawn from the labor market, the relevant inquiry, whatever the purpose of the move, is whether the employee would have a reasonable expectation of earning an adequate livelihood in the town of destination." See also Blaeser v. American Hoist & Derrick Co., 40 W.C.D. 389 (W.C.C.A. 1987); Black v. Episcopal Church Home, slip op. (W.C.C.A. February 1, 1994).

"Whether an employee has removed himself from the labor market is a question of fact, the resolution of which will not be disturbed on appeal unless manifestly contrary to the evidence." Schroeder v. Highway Servs., 403 N.W.2d 237, 238, 39 W.C.D. 723, 725 (Minn. 1987). In this case, the unemployed employee returned to Albert Lea where she had grown up and where she owned a house. She began a job search within a month after moving to Albert Lea. Although employment opportunities are fewer and the wage scales lower than in the Twin Cities, the Albert Lea area is not sparsely populated nor are job opportunities virtually nonexistent as in the Paine case. The employee has obtained a variety of jobs in the Albert Lea area, and has been steadily employed since September 3, 1996. Mr. Larsen testified the employee cooperated with rehabilitation services, and her earnings were an accurate reflection of her earning capacity in the southern Minnesota market. Given these facts, the compensation judge reasonably concluded the employee's move to Albert Lea, Minnesota, was not a removal from the labor market so as to preclude her entitlement to temporary partial disability benefits. We affirm that finding.

The compensation judge also found "[i]nitially the employee looked for positions which she could claim, but was unable to locate a position" (Finding 5) and found the "employer did not . . . make a job offer to the employee at the time she was laid off." (Finding 6.) The employer contends these findings are unsupported by substantial evidence of record. This argument has merit. It is apparent from the testimony of the employee and Ms. Patrin and from Exhibit 4, that the employee decided before the layoff to relocate to southern Minnesota. Accordingly, she made no effort at that time to "claim" or locate a job in the metropolitan area. Ms. Storelee testified that ten jobs were available in the metropolitan area in October and November 1995 which the employee could have claimed. This testimony was unrebutted. However, even if we reversed these findings our decision on withdrawal from the labor market would remain the same. The fact that an employee moves from the Twin Cities to a smaller labor market does not automatically sever the causal link between the injury and the resultant wage loss. Robinson v. Minnesota Vikings Football Club, 42 W.C.D. 1151 (W.C.C.A. 1990). Rather, the question is whether the employee's actions constituted a withdrawal from the labor market. This is a question of fact. The compensation judge found she did not withdraw from the labor market. There is substantial evidence to support this determination and we, must, therefore, affirm.

Rebuttal of Earning Capacity Presumption

Generally, an employee's actual earnings are presumptively representative of her earning capacity. French v. Minnesota Cash Register, 341 N.W.2d 290, 36 W.C.D. 385 (Minn. 1983). In appropriate circumstances, however, this presumption may be rebutted with evidence

indicating the employee's ability to earn is different than the post-injury wage. Einberger v. 3M Co., 41 W.C.D. 727 (W.C.C.A. 1989). The compensation judge found the employee's earnings after September 3, 1996 accurately reflected her earning capacity. (Finding 11.) The appellant argues this finding is clearly erroneous and unsupported by substantial evidence. The Department contends the earning capacity presumption was rebutted by the testimony that ten physically suitable, higher paying jobs were available to the employee in the metropolitan area in October and November 1995. The employee chose not to accept any of these jobs and thereby voluntarily chose to be underemployed. Thus, the appellant contends, the employee's ability to earn exceeds her present earnings and the presumption was rebutted. In support of its position, the appellant cites Herrly v. Walser Buick, 46 W.C.D. 530 (W.C.C.A. 1992) summarily aff'd (May 4, 1992) and Garrett v. Ford Motor Co., slip op. (W.C.C.A. 1992). We do not find these cases applicable.

In both Herrly and Garrett, this court affirmed a compensation judge's finding that the presumption was rebutted because the employee was underemployed in the relevant labor market. In this case, the employee's move to Albert Lea did not constitute withdrawal from the labor market. Accordingly, the relevant labor market is the Albert Lea area, not the metropolitan area as the appellant argues. Generally, an employee is not required to seek employment outside his home community. Fredenberg v. Control Data Corp., 311 N.W.2d 860, 34 W.C.D. 260 (Minn. 1981). The question of whether the self-insured employer rebutted the presumption is, therefore, grounded in an analysis of Albert Lea/southern Minnesota labor market. The fact that there may have been better paying jobs in the metropolitan area does not rebut the presumption that the employee's earnings in Albert Lea after September 3, 1996, were representative of her earning capacity.

Ronald Larsen testified that the employee cooperated with the rehabilitation process. Mr. Larsen conceded the employee limited her job search to the clerical and social service fields. Generally, the social service field pays less than clerical work. (T. 94-95.) The employee was previously licensed as a teacher but had no interest in returning to that field. (T. 96.) Based on the restrictions, Mr. Larsen acknowledged the employee is not limited to social service or clerical work. (T. 96-97.) However, the QRC felt at some point the employee may be able to obtain a supervisory type position which could pay from $9.00 to $11.00 an hour. (T. 97-98.) He opined the employee's earning capacity in the clerical and social service areas in southern Minnesota was $6.50 to $7.50 per hour to start. (T. 92.)[4] Jane Moncharsh administered a series of vocational tests to the employee. Based on these tests, she concluded the employee had superior intellectual and problem-solving ability, a wide variety of employment and job skills and a consistent work history. Ms. Moncharsh did a labor market analysis in the metropolitan area. She concluded that from November 1995 through December 1997 there were "virtually thousands of jobs in a wide variety of categories" for which the employee was physically and vocationally

[4] At Rathjen House the employee started at $6.00 an hour and received a raise to $6.50 an hour. She worked eight hours a day, four days a week, which was considered full-time. At Crest Homes, the employee worked 19 and a half hours a week and was paid $7.50 per hour, plus benefits. (Resp. Ex. 2.)

suited. (T. 134.) Some of these jobs included teacher, teaching assistant, clerical positions and customer service jobs. (Resp. Ex. 2.) Finally, Ms. Moncharsh opined the employee's earnings were only a "minimal reflection" of her earning capacity because she has an ability to earn higher wages in a different field. (T. 144.)

Determination of earning capacity is generally a factual question to be decided by the compensation judge. Noll v. Ceco Corp., 42 W.C.D. 553 (W.C.C.A. 1989). Ms. Moncharsh testified the employee was underemployed in the Albert Lea area because she limited her job search to social service positions. There was, however, no evidence of any specific jobs available to the employee. To establish earning capacity different from actual earnings, there must be something more than evidence of a hypothetical job paying a theoretical wage. Saad v. A.J. Spanjers, 42 W.C.D. 1184 (W.C.C.A. 1990). Although the focus of rehabilitation was limited, the employee did cooperate with the rehabilitation assistance provided her. The employee does have a college degree but she is 62 years of age. Mr. Larsen testified the employee's earnings accurately reflected her earning capacity. We conclude there is substantial evidence of record to support the compensation judge's decision that the employee's earnings accurately reflect her earning capacity. Accordingly, we affirm the award of temporary partial disability benefits.